86-876

No. .....

Supreme Court, U.S.
FILED
NOV 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

STAR-KIST FOODS, INC.,
a California corporation,
Petitioner,

vs.

COUNTY OF LOS ANGELES, CITY OF LOS ANGELES
AND CITY OF LONG BEACH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHARLES R. AJALAT, ESQ.
643 SOUTH OLIVE STREET, SUITE 200
LOS ANGELES, CALIFORNIA 90014
(213) 622-7400
Attorney for Petitioner.

TERRY L. POLLEY, ESQ.
RICHARD J. AYOOB, ESQ., AND
AJALAT & POLLEY, A Partnership
Including Professional Corporations
Of Counsel.

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QUESTIONS PRESENTED

1. Is the well-established rule that subordinate political entities, as "creatures" of the state, may not challenge state action, inapplicable to challenges by subordinate political entities under the Commerce Clause of the United States Constitution?

2. Did a state statute, valid when enacted, which confirmed the immunity of certain imported goods from state property taxation under the original package doctrine of *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1872), become unconstitutional as a regulation of foreign commerce immediately following this Court's decision in *Michelin* overruling *Low v. Austin* particularly when it is consistent with the policies of the Import-Export and Commerce Clauses favoring the free flow of commerce and there is no showing of interference with the federal government's ability to speak with one voice when regulating commercial relations with foreign governments under *Japan Lines, Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979), and *Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983)?

3. Unlike the situation which existed prior to *Michelin* and the situation in *Japan Lines*, must state taxing statutes subsequent to *Michelin* treat foreign commerce and interstate commerce with meticulous equality?

4. Where there is no showing of an impermissible burden on interstate commerce, there is no penalty or disincentive on the choice to transact business in another state, local interests are not favored, and the exemption is available regardless of the residency of the shipper or the out-of-state place of manufacture of the goods, is a State prohibited from "compet[ing] with other States for a share of interstate commerce" under *Boston Stock Ex-*

change v. State Tax Comm'n, 429 U.S. 318 (1977) and *Westinghouse Electric Corp. v. Tully,* 466 U.S. 388 (1984)?

5. Is it sufficient to invalidate a state statute exempting certain imported goods from property taxation simply to point out that a comparable exemption was not accorded goods brought into the state from other states without any showing as to the extent of actual discrimination against interstate commerce, if any?

6. If the property tax exemption violates the Commerce Clause, particularly considering the fact that all other California counties (57 of 58) granted the property tax exemption, and this Court, without opinion, split 4-4, should the doctrine be applied retroactively prior to January 26, 1981, the time this Court issued a final decision in *Sears,* affirming the doctrine of *Zee Toys v. County of Los Angeles,* 85 Cal.App.3d 763 (1978)?

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VS.

COUNTY OF LOS ANGELES, CITY OF
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner Star-Kist Foods, Inc., a corporation[1], respectfully prays that a writ of certiorari issue to the Supreme Court of the State of California, to review that Court's decision holding (1) that Defendants County of Los Angeles, City of Los Angeles and City of Long Beach have standing to attack the constitutionality of a statute of the State of California, and (2) that California Reve-

[1]The parties to the proceeding in the California Supreme Court are Petitioner, (Plaintiff and Appellant), Star-Kist Foods, Inc., a California corporation, and Defendants and Respondents, County of Los Angeles, City of Los Angeles, and City of Long Beach. Star-Kist Foods, Inc. is a wholly-owned subsidiary of H. J. Heinz. The subsidiaries of Star-Kist Foods, Inc. are set forth in Appendix D.

nue and Taxation Code Section 225, providing for an exemption from property taxation of imported goods brought into the state for shipment outside the state, is invalid on the grounds that such an exemption constitutes a regulation of foreign commerce and a discrimination against interstate commerce in contravention of the United States Constitution.

OPINION BELOW

The opinion of the Supreme Court of California is reported at 42 Cal.3d 1 (1986) and is set forth in Appendix A, hereto.

PRIOR UNITED STATES SUPREME COURT ACTION

The United States Supreme Court previously granted certiorari on these two important issues, and affirmed without opinion by an equally divided court, with J. Stewart not participating. *Sears, Roebuck and Co. v. County of Los Angeles*, 449 U.S. 1119 (1981), and *Walter Fleisher v. County of Los Angeles*, 449 U.S. 608 (1981). Contrary to the position of the Supreme Court of California in the instant case, in *Sears*, the Solicitor General filed an amicus curiae brief recommending that the California statute be held constitutional, and such brief is set forth in Appendix B, hereto.

JURISDICTION

The decision of the Supreme Court of California to be reviewed was entered on June 30, 1986, with a dissenting opinion by Justice Lucas. A petition for rehearing was denied on August 28, 1986 with Justice Lucas of the opinion the petition should be granted.

The jurisdiction of this Court is invoked under 28 United States Code, Section 1257(3).

This Court's review by certiorari is sought on the grounds that the California Supreme Court has determined novel and substantial questions arising under the United States Constitution involving the application of this Court's decisions in *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933), ("standing" issue), *Westinghouse Electric Corporation v. Tully*, 466 U.S. 388, 406 fn. 12, (1984), and *Michelin v. Wages*, 423 U.S. 276 (1976), ("Commerce Clause" issue), to one of California's tax laws, and has decided them in a manner the petitioner believes to be erroneous.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article I, Section 8, Clause 3 of the United States Constitution: "Congress shall have the power to regulate commerce with foreign nations and among the several states."

2. California Revenue and Taxation Code Section 225 reads in pertinent part: "Personal property manufactured or produced, (1) outside this state and brought into this state for transshipment out of the United States, or (2) outside of the United States and brought into this state for transshipment out of this state, for sale in the ordinary course of trade or business shall be exempt from taxation."

STATEMENT OF THE CASE

Petitioner brought this suit for refund of ad valorem personal property taxes paid under protest to the County of Los Angeles, and the cities of Los Angeles, and Long Beach.

Petitioner is a producer and seller of canned tuna. All of the tuna involved herein was manufactured or pro-

duced outside the United States and had been imported and held in warehouses in California on the tax lien date, March 1, 1976, awaiting shipment out of state in the ordinary course of petitioner's business. All such goods were in their original packages and would have been Constitutionally immune from state taxation under the original package doctrine of *Low v. Austin,* if that case had not been overruled by *Michelin*, decided in January, 1976.

In 1972, in *Volkswagen Pacific Inc. v. City of Los Angeles,* 7 Cal.3d 48 (1972), the California Supreme Court held that goods which were imported by a wholesaler in sea vans and removed from the sea vans for sale and delivery to dealers were not immune from a city license tax. Many county assessors erroneously interpreted the *Volkswagen* case as holding that all goods imported in sea vans lost their immunity upon the opening of the vans. The resulting assessments caused widespread consternation among California importers many of whom commenced diverting their imports from California ports to ports in other states such as Oregon and Washington which have previously enacted "free port" laws. Some 37 states at the time had such laws.

In an effort to prevent the diversion of imports from California to other states having "free port" laws, the California legislative enacted its own free port law, California Revenue and Taxation Code Section 225. Insofar as relevant, it provides that goods produced outside the United States and brought into California for shipment and sale outside the state are exempt from property taxation. The section was enacted in 1975 and became effective January 1, 1976. Both the date of enactment and the effective date preceded this Court's decison in *Michelin.*

The tax status of goods other than the imports described in the preceding paragraph was not affected by Section 225. Thus goods imported for sale or use in California were, at the time the section was enacted, either immune or taxable depending on whether or not they met the requirements of the original package doctrine. Goods produced in the state and still in the state on its tax date remained fully taxable regardless of whether brought in for sale or use in, or for shipment and sale outside, the state.

The *Michelin* case which overruled *Low v. Austin*, thereby terminating the original package doctrine, was decided in January, 1976. The state thus obtained jurisdiction for the first time in 105 years to tax imported goods as fully as it could tax goods produced locally or brought in from other states. Goods imported for sale and delivery in California thus became taxable. However, Section 225 continued to provide an exemption for goods imported into the state and held here temporarily for subsequent shipment and sale outside the state. A similar exemption was not accorded to goods brought into the state from other states and held here temporarily for subsequent shipment and sale outside the state.

Respondents, through the Assessor of Los Angeles County, denied the claimed exemption. The other 57 of California's 58 counties followed the statute, granted its taxpayers the exemption and such taxpayers have never been assessed taxes as a result of the exemption having been declared unconstitutional.

Los Angeles County asserted that Section 225 violates the United States Constitution by regulating interstate and foreign commerce in interfering with foreign affairs, because it extended no exemption to interstate goods. Petitioner thereupon paid the tax under protest and

instituted this action for refund in the Superior Court of Los Angeles County.

The same issues were involved in three other cases in the Los Angeles Superior Court, *Zee Toys v. County of Los Angeles, Sears, Roebuck v. County of Los Angeles,* and *Walter Fleisher v. County of Los Angeles.* The California Superior Court upheld the validity of the tax exemption in these cases but the California Court of Appeal reversed, holding that the county and cities had standing to attack the state statute, but that Section 225 violated the Commerce Clause because it regulated interstate and foreign commerce. *Zee Toys v. County of Los Angeles, Sears Roebuck & Co. v. County of Los Angeles,* 85 Cal.App.3d 763 (1978). By a four to three vote, (three Justices dissenting), the Supreme Court of California denied a petition for hearing.

A petition for certiorari in *Sears* was filed in this Court. Upon this Court's invitation, the Solicitor General filed an amicus curiae brief and recommended that certiorari be granted and that the statute be held constitutional under the Commerce Clause. This Court granted certiorari in the *Sears* and *Walter Fleisher* cases, but split four to four: "The judgment is affirmed by an equally divided court. Justice Stewart took no part in the consideration or decision of this case." 449 U.S. 119, 67 L.Ed.2d 106 (1981).

In the instant case, based upon *Zee Toys,* the Los Angeles Superior Court held that the County and cities had standing to attack the state statute, and that Section 225 was unconstitutional. The California Court of Appeal reversed. (See Appendix C) While it held that the County and cities had standing to attack the statute, it went on to hold the statute *was* constitutional. The Supreme Court of California granted a petition for hearing, holding contrary to the Court of Appeal and upholding the trial

court's decision that the statute violated the Commerce Clause.

The Supreme Court of California held that the well-established rule that subordinate political entities, as "creatures" of the state, may not challenge state action, *Williams v. Mayor of Baltimore,* 289 U.S. 36, 40 (1933) applied under federal law only to challenges under the Fourteenth Amendment or the contract clause of the Federal Constitution and not to Commerce Clause challenges, notwithstanding the opinion of the Ninth Circuit Court of Appeals to the contrary. *City of South Lake Tahoe v. California Tahoe Regional Planning Agency,* 625 F.2d 231, cert. den., 449 U.S. 1039 (White, Marshall, JJ., dis.) (9th Cir. 1980). The Court believed that a Fifth Circuit Court of Appeal decision and a federal district court decision applied. *Rogers v. Brockette,* 588 F.2d 1057, cert. den. 444 U.S. 827 (5th Cir. 1979); *San Diego Unified Port Dist. v. Gianturco* (S.D. Cal. 1978) 457 F.Supp. 283, aff'd 651 F.2d 1306, cert. den., 455 U.S. 1000.

Having held that there was standing to attack the statute, the Supreme Court of California held the statute violated the Commerce Clause, implying that it may offend Congress' power to regulate foreign commerce under *Michelin* and *Container Corp.*, and that it discriminates unconstitutionally against interstate commerce under *Boston Stock Exchange* and *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977).

Justice Lucas dissented on the basis that the majority applied improper analysis and that the decision improperly precludes the Legislature from future use of this valid device to attract foreign commerce to California ports.

Justice Lucas pointed out that although the majority conceded nondiscriminatory taxes would have no impact

on the foreign commerce power, that an exemption from tax might actually offend that power because it may operate to nullify the curative effect of federally imposed tariffs. The dissent submitted that such speculation is not sufficient to strike down an otherwise valid exercise of state power. Citing *Container Corp., Japan Line*, and the amicus curiae brief of the Solicitor General in *Sears*, Justice Lucas found that the challenged exemption neither implicates foreign policy nor violates a clear federal directive, and does not impair federal uniformity, preventing the federal government from "speaking with one voice" in international trade. Rather than violate any policy of the foreign Commerce Clause, the exemption, if anything, facilitated the flow of foreign commerce.

Justice Lucas also pointed out the majority's error in using the *Complete Auto* analysis of whether a tax interferes with interstate commerce, to determine whether the exemption in question unduly burdens interstate commerce. Justice Lucas believes *Westinghouse Electric* is controlling and upholds the constitutionality of the exemption under the Commerce Clause. He pointed out that there was no burden imposed on interstate commerce by placing a penalty or disincentive on the choice to transact business in another state, that local interests were not favored, and that the exemption is available regardless of the residency of the shipper, or the out-of-state place of manufacture of the goods.

The dissent believed the respondent's claim is really an equal protection attack and an inappropriate one under *Allied Stores v. Bowers,* 358 U.S. 522 (1959).

Petitioner believes that the Supreme Court of California misunderstands the rule of *Williams v. Baltimore* and the Ninth Circuit opinion in *City of South Lake Tahoe*, and that local governments cannot attack a statute of their creator, the State of California.

Petitioner further believes that the Supreme Court of California misunderstands the Commerce Clause decisions of this Court, particularly the proper application of *Westinghouse Electric* and *Boston Stock Exchange* both of which emphasize that the Commerce Clause does "not prevent the states from structuring their tax systems to encourage the growth and development of intrastate commerce and industry" and "we do not 'hold that a state may not compete with other states for a share of interstate commerce: such competition is at the heart of free trade policy.'" *Boston Stock Exchange v. State Tax Comm'n* 429 U.S. 318, 336-7 (1977); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 406, fn. 12 (1984). If Section 225 is not constitutional, it is questionable whether *any* state incentive can ever be constitutional.

The California Supreme Court should be directed to recall its remittitur and hold that there is no standing of the local governments to attack the statute, and if there is, the statute is constitutional.

STATEMENT OF REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Supreme Court of California has distorted and ignored this Court's well-established rule, which is followed by the Ninth Circuit, that local governments cannot attack a statute of their creator. The question of whether this rule has been limited by the Fifth Circuit, and the federal district court for the southern district of California and the resolution of the conflict between the Ninth Circuit and Fifth Circuit, two federal courts of appeal, is a question that should be appropriately decided by this Court, and not the Supreme Court of California.

With respect to the Commerce Clause question, the Supreme Court of California attempts to defend the interest of the United States, and to declare its own

statute unconstitutional, notwithstanding the position of the United States that the statute is constitutional. See Brief of the United States, attached as Exhibit B.

As pointed out by the Solicitor General, there is no constitutional prohibition against favoring imports over domestic goods. The Import-Export Clause of the Constitution itself makes such a differentiation. The decisions of this Court involving imports, exports, and foreign commerce uniformly emphasize that one of the principal purposes of the Constitution was to assure that the states did not impede or obstruct importation, exportation or foreign commerce. Although *Michelin* held a state was not constitutionally required to exempt imports, nothing in the decision suggested that the exemption that had previously been constitutionally required under decisions overruled by *Michelin* was thereafter constitutionally prohibited. Nothing in the Commerce Clause prevents a state from favoring imports and exports, and their transshipment through a state, beyond the extent required by the Import-Export Clause.

Although it is clear that a state may, for years subsequent to *Michelin*, tax imported goods which were previously immune, must it do so? Or, may a state in order to prevent the diversion of its import business to other states, such as Oregon and Washington which have enacted free port laws, continue to exempt goods which previously were immune from state taxation for over 100 years without at the same time revising its laws to exempt goods moving in interstate commerce which were historically taxable even while the immunity of imported goods existed?

If there is to be adopted a rule that foreign and domestic commerce must always meticulously be treated equally, numerous important state tax policies will be swept off the books. The rule urged by respondents and

upheld by the Court below that after *Michelin* state taxing statutes must treat foreign commerce and interstate commerce with meticulous equality is contrary to the philosophy of *Allied Stores v. Bowers,* 358 U.S. 522 (1959), which held that a state may tax the goods of nonresidents more favorably than the goods of residents. The adoption of a rule requiring hard and fast equality would give rise to serious questions as to the validity of a great many state taxing policies.

One of the most important of these involves the dramatic international tension that has existed regarding California's so called "unitary tax." Respecting the importance of the State's power to determine what and how to tax (and what and how not to tax), this Court in *Container Corp. v. Franchise Tax Board,* 463 U.S. 159 (1983) upheld worldwide combination. Because of the international furor over the "unitary tax," after *Container,* the President of the United States formed a Working Group to deal with the problem.

Its keystone recommendation was that there be state legislation limiting combination of income to the "water's edge" and not including "foreign source" income as part of the taxing base. Such legislation has finally after many difficult years been enacted in California, under the threat of federal government legislation. If a rule were adopted in this case that foreign and domestic commerce had to be treated the same, such legislation would be voided since domestic source income is combined, but foreign source income is excluded. Under the decision below, such a distinction would violate the Commerce Clause.

As noted above in the discussion of the dissent of Justice Lucas in the Supreme Court of California, not only are no policies of the foreign commerce clause

contravened, but the tax exemption statute at issue actually furthers the free flow of commerce.

Further, there is no violation of the interstate commerce clause. If a statute such as the one in question

> (1) where there is no burden on interstate commerce by placing a penalty or disincentive on the choice to transact business in another state,
>
> (2) where local interests are not favored, and
>
> (3) where the exemption is available regardless of the residency of the shipper or the out-of-state place of manufacture of the goods,

is not constitutional, it would make meaningless this court's emphasis on allowing states to structure their tax systems to encourage the growth and development of intrastate commerce and industry and to compete for a share of interstate commerce, with such competition being at the heart of a free trade policy (*Westinghouse Electric*, 466 U.S. 388 (1984)). If Section 225 is not constitutional, presumably no state incentive can ever be constitutional.

Respondents have made no effort whatsoever to establish that Section 225 results in actual discrimination against interstate commerce. It may well be that goods brought into the state from other states for shipment and sale outside the state are seldom, if ever, assessed for property taxation in California. Certainly there is nothing in the record to support a contrary conclusion. For this reason alone the decision of the Court below should be reversed. It strikes down a state taxing statute solely on a *per se* basis contrary to recent pronouncements of this Court concerning the extent to which interference with commerce is required before the Commerce Clause invalidates state tax provisions.

As a matter of proper judicial interpretation, the constitutionality of the statute should have been upheld unless it was clear the statute is unconstitutional. The judicial history of the attack on the statute shows no one could argue it is clearly unconstitutional: the California Supreme Court denied a petition for hearing in *Sears* four to three, this Court split four to four in *Sears* and the Court of Appeal in this case upheld the statute as constitutional. Legislative enactments are presumed constitutional and local governments have long been prohibited from attacking statutes of their creator.

Even if it should be held that state tax laws must hereafter deal equally with foreign and interstate commerce, a period of grace should be allowed the states in which to revise their laws. Such grace period or nonretroactivity is particularly appropriate in the unique circumstances of the instant case:

(1) a county with dubious authority to do so, attacked a statute of its creator,

(2) in every other county of the state, the exemption was granted, and

(3) there were superior courts holding the statute constitutional, and others holding it unconstitutional, the *Zee Toys* Court of Appeal held the statute unconstitutional, and the *Star-Kist* Court of Appeal held the statute constitutional, the California Supreme Court denied a petition for hearing in *Zee Toys* four to three, and this Court split over the issues involved four to four. It is submitted that were there such a doctrine holding under *Michelin* and *Boston Stock Exchange* that the free flow of foreign commerce could not be facilitated as Section 225 does, that such doctrine should not be applied to matters arising prior to the decision in *Sears,* January 26, 1981.

ARGUMENT

I.

There is Not an Exception, for Commerce Clause Attacks, to the Well-Established Rule that Subordinate Political Entities Cannot Challenge a Statute of Their Creator

In *Williams v. Baltimore,* 289 U.S. 36 (1932), the Maryland Legislature had by statute exempted certain railroad property from all state taxation, including property taxation. The Mayor and City Council of Baltimore and similar officials of Annapolis attacked the constitutionality of the statute on federal (Fourteenth Amendment) constitutional and state constitutional grounds. The Fourth Circuit Court of Appeals held the statute unconstitutional on those two sets of grounds, and the United States Supreme Court granted writs of certiorari. The Court held the Baltimore and Annapolis officials had no standing to attack the statute on federal constitutional grounds, although because it had not been objected to by the parties, the Court heard the attack based on *state* constitutional grounds.

The Court held that local governmental entities do not have standing to attack statutes of a superior body on federal constitutional grounds: "A municipal corporation, created by a state for the better ordering of government has no privileges or immunities under the federal Constitution which it may invoke in opposition to the will of its creator . . . " *Williams v. Baltimore, supra,* 289 U.S. 36, at p. 40. The Court even questioned whether *state* constitutional grounds could be raised by the local governmental entities in attacking the statute, while simultaneously emphasizing their lack of standing to argue federal constitutional issues: "We have assumed, without deciding, that the respondents, *though without standing to invoke the*

protection of the Federal Constitution, will be heard to complain of a violation of the Constitution of the State . . ." *Williams v. Baltimore, supra*, at pp. 47-48. (Emphasis added)

The lack of "standing to invoke the protection of the Federal Constitution" was certainly not limited in *Williams* to the Fourteenth Amendment and the contract clause.

Rather, as the Supreme Court of California recognizes "In *City of South Lake Tahoe v. California Tahoe Regional Planning Agency* (9th Cir. 1980) 625 F.2d 231, cert. den. 449 U.S. 1039 (White, Marshall, JJ., dis.) the Ninth Circuit interpreted this 'no standing' rule as absolutely barring political subdivisions from challenging state statutes on any federal constitutional ground." (42 Cal.3d 1, 7.)

The Supreme Court of California, ignoring the clear cut rule, cited a Fifth Circuit opinion and various federal district court opinions which have held that "the rule does not extend to supremacy clause challenges to state laws." The Court found the Fifth Circuit opinion — *Rogers v. Brockette* 588 F.2d 1057, cert. den., 444 U.S. 827 (5th Cir. 1979) — to imply a rule contrary to that of the Ninth Circuit, although the Fifth Circuit's opinion seems strictly limited to the supremacy clause.

The Supreme Court of California erroneously relies on a federal district court decision which allowed standing for a local government to "invoke the supremacy clause despite its lack of capacity to raise other constitutional claims" because the supremacy clause "establishes a structure of government which defines the relative powers of states and the federal government." (*San Diego Unified Port Dist. v. Gianturco* (S.D. Cal. 1978) 457

F.Supp. 283, aff'd 651 F.2d 1036, cert. den., 455 U.S. 1000, at 457 F.Supp. 290.)

Attempting to understand the rule from *Rogers-Gianturco*, the Supreme Court of California found that "the commerce clause resembles the supremacy clause in that it albeit indirectly 'defines the relative powers of states and the federal government. (*Gianturco, supra*, 457 F. Supp. at p. 290) The Court, thus, understood there to be an exception for Commerce Clause challenges by local governments under the doctrine of the lack of local government's power to attack state statutes.

The Court is incorrect in its comment that "In the present case, for example, there is a real possibility that the constitutionality of the Legislature's scheme of differential taxation of business inventories would have gone unchecked absent challenge by those entities charged with administration of the program." *Star-Kist Foods, Inc. v. County of Los Angeles, et al* 42 Cal.3d 1, at p. 9. If, in fact, there was a discrimination against interstate commerce, those involved in such commerce could well raise the claim. See, for example, the discriminated taxpayers in *Westinghouse Electric* or *Boston Stock Exchange*.

The people of California entrusted their legislative representatives to determine what personal property should be exempt. "The constitution further empowers the Legislature . . . to 'classify such personal property for differential taxation or for exemption.' " (Cal. Const. Art. XIII.) By having its "creatures", all of the forms of local government, be able to attack the statutes the State Legislature creates is only to spawn litigation upon litigation, with an ever-expanding role of government. It is precisely this legislative-type role of making up new legal rules that has made the Supreme Court of California the subject of controversy in the California November, 1986 election.

If the Court determines that the County and cities have no standing, petitioner requests that rather than dismissing, the case be remanded to the California Supreme Court for further proceedings consistent with its opinion inasmuch as the California Court misunderstood the rule of standing.

Were this Court for any reason to consider dismissing for lack of standing rather than remanding, petitioner would, in the alternative, request this court to find in the context of this case that the County and local governments *do* have standing on the basis that they were not attacking the statute of their creator, but continued to refuse the refunds based on the exemption granted by Section 225 simply because they felt bound by the judicial determination in *Zee Toys,* 85 Cal.App.3d 763 (1978) affirmed by a split court 449 U.S. 119 (1981) that Section 225 was unconstitutional.

It would be unfair to petitioner who for over 10 years has sought a refund based on a state legislatively-granted exemption, to be refused that exemption on federal constitutional grounds, without the opportunity of having the highest arbiter of federal constitutional law, the United States Supreme Court, review the very important question of federal law. To avoid the "catch 22" of the dismissal route, petitioner early in its case advised the members of the State Board of Equalization, the Attorney General, the individual members of the Board of Supervisors, the Assessor, the Tax Collector, and the Auditor-Controller that they may wish to intervene in the instant case, so that if there be no standing under *Williams v. Baltimore,* there might be standing under *Board of Education v. Allen* (1968) 392 U.S. 236. The state and local officials contacted have not chosen to intervene. 28 U.S.C. § 2403(b) may be applicable to this case.

Constitutional law scholars and the bar have waited for many, many years to have the standing question resolved. It appeared it would be resolved in *Sears* but the Court split four to four. The issue of standing involved in the present case should now be addressed, but without prejudice to petitioner being heard by the Court on the important Commerce Clause substantive question discussed below.

II.

The Statute Involved Does Not Result in an Invalid Regulation of Foreign Commerce: It Was Valid When Enacted, *Michelin* Did Not Invalidate it, it is Consistent with the Policies of the Import-Export and Commerce Clauses, Favoring the Free Flow of Commerce, and it does not Interfere with the Ability of the Federal Government to Speak with One Voice

The Solicitor General (see Exhibit B) distinguished *Boston Stock Exchange* from the instant situation:

> "Here, in contrast, the statutory property tax exemption did not favor local business at the expense of out-of-state business. It favored imports and exports. *There is, however, no constitutional prohibition against favoring imports over domestic goods. The Import-Export Clause of the Constitution itself makes such a differentiation.* Section 225 . . . *facilitates importation and exportation . . . Nothing in the Commerce Clause prevents a state from favoring imports and exports beyond the extent required by the Import-Export Clause.*" (Page 6 of Brief of the United States, Exhibit B, emphasis added.)

The position of the United States in the matter is that state statutes, such as Section 225, which favors imports over domestic goods, are not constitutionally prohibited

but, rather, constitutionally compatible with the Import-Export and Commerce Clauses of the Constitution.

The federal government's view though not dispositive, is of great help for three important reasons:

(1) the logic of its position and its understanding of the cases are sound, and rooted in policy;

(2) its views are independent and uninfluenced by a stake in the litigation (its views were requested by this Court); and

(3) its views are those of the party whom the California Courts sought to protect, even though the federal government not only feels Section 225 is constitutional, but that it is in furtherance of important federal constitutional principles behind the Import-Export and Commerce Clauses.

It is important to note that the statute in question was enacted in 1975 at a time when imported goods of the kind involved herein were immune from state taxation. At the time, and for over 100 years prior thereto, it was permissible for a state to tax goods coming into the state in interstate commerce notwithstanding that goods imported from foreign countries were immune from such taxation. Thus the statute was entirely valid at the time of its enactment.

If after *Michelin* the legislature had enacted a statute imposing a substantially higher tax on imported goods than it imposed upon other goods, one could accept the conclusion that the statute constituted an invalid regulation of foreign commerce. It is difficult to understand, however, how the simple continuation of a pattern of taxation which validly existed for over 100 years can suddenly overnight be converted into an unconstitutional regulation of foreign commerce.

It is even more difficult to understand how the continuation of such a pattern in any way frustrates Congressional policy in establishing tariffs, as held by the lower court. To the best of petitioner's knowledge, Congress has never taken state property taxes into account in the imposition of tariffs on imported goods. It would be extremely difficult, if not impossible, for it to do so. There are 50 different states with widely different tax systems and tax rates. Even if there were any merit to the argument, the effect of the statute in question is, in the overall context, *de minimis*.

It is fanciful for the lower court to hold that the statute involved herein may frustrate Congress in the levying of tariffs. Such a speculative foundation should not be permitted to stand as the basis for invalidating a state tax statute under the United States Constitution. Some 37 states have free port laws under which goods brought into the state and held there temporarily for subsequent shipment outside the state are exempt from taxation. Before a statute can be invalidated on such grounds, there should be required a showing that there was an actual and substantial effect upon Congress' ability to regulate foreign commerce.

The exemption of Section 225 is not "pre-empted by federal law or *fatally* inconsistent with federal policy." (*Container Corp. v. Franchise Tax Board*, 463 U.S. 159 at p. 197, emphasis added.) "Primarily, the majority has failed to demonstrate how the tax exemption at issue affects any foreign policy." (*See Container Corp., supra*) (Dissent of Justice Lucas, *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal.3d 1, 18 (1986)) This is also no violation of a clear federal directive nor impairment of "speaking with one voice." (*Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal.3d 1, Dissent pp. 18-19 (1986))

Justice Lucas significantly notes, that "rather than impeding the flow of foreign commerce, this exemption, if anything, facilitated this channel of trade." (*Star-Kist v. County of Los Angeles*, 42 Cal.3d 1, 19 (1986)).

III.

State Taxing Statutes Should Not Be Required to Treat Foreign Commerce and Interstate Commerce With Meticulous Equality

A hard and fast rule of equality, such as that proposed by the lower court, would not only violate the policies of *Allied Stores v. Bowers*, 358 U.S. 522 (1959) but would lead to serious doubts as to the validity of various other state taxing policies.

For example, California, as indicated above, as a result of intensive study by the President of the United States' Working Group, and as a result of federal pressure, has alleviated international tensions by enacting a water's edge bill — limiting the combination of worldwide income in the franchise tax area. If the Court below is correct, there would be an unconstitutional discrimination in the new legislation.

In the above and numerous other instances which could be mentioned, a hard and fast rule of equality would give rise to serious questions of validity in many state taxing statutes.

IV.

The Statute Involved Does Not Burden Interstate Commerce Where There is no Showing of an Impermissible Burden, There is no Penalty or Disincentive on the Choice to Transact Business in Another State, Local Interests are not Favored and the Exemption is Available Regardless of the Residency of the Shipper or the Out-of-state Place of Manufacture of the Goods

Respondent County has assumed any different treatment of foreign commerce vis-a-vis interstate commerce is prohibited by the Commerce Clause. This is not true. Clearly, foreign commerce can be favored over interstate commerce. *Japan Lines v. County of Los Angeles,* 441 U.S. 434 (1979); *Westinghouse Electric v. Tully,* 466 U.S. 388, 406 fn. 12 (1984). In fact, favoring the free flow of foreign commerce is totally consonant with the underlying purposes of the Commerce Clause.

The Court in *Westinghouse* recognized "a State's interest in exercising its taxing powers"... that the Commerce Clause does "not prevent the states from structuring their tax systems to encourage the growth and development of intrastate commerce and industry."... and that "As in *Boston Stock Exchange,* we do not 'hold that a state may not compete with other states for a share of interstate commerce: such competition is at the heart of free trade policy.' " *Westinghouse Electric v. Tully,* 466 U.S. 388, 406 fn. 12 (1984).

If a statute such as the one in question where

> (1) there is no burden on interstate commerce by placing a penalty or disincentive on the choice to transact business in another state,
>
> (2) local interests are not favored, and

> (3) the exemption is available regardless of the residency of the shipper or the out-of-state place of manufacture of the goods,

is not constitutional, it would make meaningless this Court's emphasis on allowing states to structure their tax systems to encourage the growth and development of intrastate commerce and industry and to compete for a share of interstate commerce, with such competition being at the heart of a free trade policy (*Westinghouse Electric Corp. v. Tully,* 466 U.S. 388 (1984)). If Section 225 is not constitutional, presumably no state incentive can ever be constitutional.

The Supreme Court in *Westinghouse* stated clearly that a credit or exemption favoring exports does not violate the Commerce Clause:

> *We reiterate that it is not the provision of the [export] credit that offends the Commerce Clause, but the fact that it is allowed on an impermissible basis." (Ibid.* at 406, fn. 12 (emphasis added)).

As Justice Lucas correctly indicates in the dissent: "A recent United States Supreme Court case appears controlling . . . *Westinghouse Electric Corp. v. Tully* (1984) 466 U.S. 388, . . ."

The *Westinghouse* and *Boston Stock Exchange* taxing schemes were not problematic because of the positive incentives they created, but were infirm due to the taxing state imposing automatic *penalties* on activities *occurring in other states.* The Court struck down the laws in question on the basis that such burdens cannot be imposed on such activities outside the state. Section 225 does not reach or tax or penalize activities occurring in other states. There is no use of the power of the state to force out of state manufacturers or producers to transship through California. They can avoid California property taxation by ship-

ping directly through California to the ultimate destination. Goods in transit are constitutionally immune from property tax under the Commerce Clause if the transportation is not interrupted at the behest of the owner. *Bacon v. Illinois,* 227 U.S. 504 (1913). Or the non-importer/exporter could avoid California property taxation by shipping through to an intermediate location in another state which does not tax inventory. Section 225 merely preserves the advantage that foreign goods have had from property taxation. *Michelin v. Wages,* 423 U.S. 276 (1976) did not require the taxation of foreign goods but only permitted such taxation.

V.

The Extent if Any of Actual Discrimination Has Not Been Established

Without any support in the record for finding that the statute either regulates foreign commerce or affects competition, the lower Court held that the statute per se violates the Commerce Clause. The Court ignored established case law which holds that state tax laws affecting commerce are invalid only if they seriously and unreasonably burden commerce in relation to benefits. *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69 (1946); *Aldens, Inc. v. Ryan,* 571 F.2d 1159, 1162 (10th Cir. 1978), citing *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977). The clear trend of the Supreme Court is to not limit the states' taxing power, e.g., *Michelin Tire Corp. v. Wages, supra; Washington Rev. Dept. v. Stevedoring Assn.,* 435 U.S. 734 (1978). *Container Corp. v. Franchise Tax Board, supra.*

VI.

If States Could Not Facilitate the Free Flow of Commerce as the Statute Involved Does, there Should Be a Grace Period of Adjustment, and/or Such Doctrine Should Not Be Applied Prior to the Affirmance by an Equally Divided Court in Sears, January 26, 1981

The litigation in the instant case has been going on for ten years. Petitioner has the only remaining cases involving Section 225 and they involve only the years 1976, (this case) and 1977, 1978 and 1979 (pending cases). Thus applying *Sears* from the 1981 date would also grant the taxpayer the appropriate relief. The *Sears* or *Zee Toys* rationale should not be applied retroactively prior to 1981 in the *instant* case, and *in all events* it should not be applied retroactively prior to 1981 in the *remaining cases* that involve this issue (Plaintiff's suits for the 1977, 1978, 1979 years). Nor in the context of this case would it be fair to require the taxpayer to wait another ten years to determine the beginning point of this new doctrine.

It would be extremely unfair to have the legislative exemption granted to all taxpayers in the other 57 counties (of California's 58 counties), and to deny taxpayers in Los Angeles County the exemption their competitors received, because in a case of first impression and a case involving a very close question, the statute was ultimately held unconstitutional. This is an issue on which the highest courts have previously split 4-3, and 4-4, and on which two different Courts of Appeal have rendered opposite decisions. In such a case of first impression, under *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971) the *Sears, Zee Toys* or *Boston Stock Exchange-Michelin* doctrine must not be applied retroactively, or a grace period of adjustment should be allowed for the states (37 states have freeport exemptions and other states distinguish in their tax laws between foreign and domestic items).

In California Superior Court decisions related to the instant case, the Court found, among ten grounds, that the retroactive application of the *Sears-Zee Toys* doctrine [*Boston Stock Exchange-Michelin*] would be unfair and would result in economic hardship, inequities, and injustices; and/or importers relied upon and could not have reasonable foreseen that the exemption would be invalidated; and/or Public policy will be served by preventing the disruptive and unjust effect of applying the *Zee Toys* decision retroactively; and/or the California Legislature in passing Revenue and Taxation Code Section 225.3 provided relief from the retroactive application of the *Zee Toys* decision to importers and exporters in many counties other than Los Angeles for the years 1976, 1977, and 1978; and that denying similar relief to taxpayers for taxes which became due in these years would be inequitable.

It is clear under the judicial doctrine of when new case law should not be applied retroactively, that a new *Zee Toys-Sears* [*Boston Stock Exchange-Michelin*] doctrine should not be applied retroactively under the facts and circumstances of this case. Rather the new doctrine should only be applied prospectively from the affirmance of *Sears* by this Court, *i.e.*, from 1981 forward.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES R. AJALAT
Attorney for Petitioner

APPENDIX A

[42 Cal.3d 1]

[L.A. No. 31918. June 30, 1986.]
STAR-KIST FOODS, INC., Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.

OPINION

REYNOSO, J. — We consider two questions: whether counties and municipalities may challenge the constitutionality of a statute exempting from ad valorem taxation business inventories of foreign origin or destination which are transshipped through the state; and if so, whether such exemption violates the commerce clause. We conclude that counties and municipalities may raise such a challenge, and that the statute in question offends the commerce clause.

The parties stipulated to the relevant facts. For tax year 1976-1977, defendants, Los Angeles County and the Cities of Los Angeles and Long Beach, assessed and levied ad valorem taxes on plaintiff Star-Kist Foods, Inc.'s[1] inventory of canned tuna present in its California warehouses on March 1, 1976, the lien date.[2] Star-Kist paid the tax, but sought a refund.

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[1]Star-Kist is a California corporation.

[2]In 1978, the Legislature enacted Revenue and Taxation Code section 538 which requires an assessor who questions the constitutionality of a particular tax provision to bring an action for declaratory relief against the State Board of Equalization in lieu of making the disputed assessment. (Stats. 1978, ch. 1188, § 1, eff. Sept. 26,

of the $44,197 assessed on that portion of Star-Kist's inventory that had been manufactured or produced outside the United States and brought into California for shipment to other states for sale in the ordinary course.[3]

Star-Kist based its refund claim on the exemption contained in newly enacted Revenue and Taxation Code[4] section 225, which provided an exemption from taxation for "[p]ersonal property manufactured or produced, (1) outside this state and brought into this state for transshipment out of the United States, or (2) outside of the United States and brought into this state for transshipment out of this state, for sale in the ordinary course of trade or business . . ."[5]

After exhausting its administrative remedies, Star-Kist brought suit in Los Angeles County Superior Court for refund of the contested taxes. Defendants asserted that the statutory exemption was invalid in that it violated the commerce clause of the federal Constitution (U.S. Const., art. I, § 8, cl. 3) by interfering with Congress' plenary power over commerce, in that it discriminated against interstate commerce.

1978.) As this controversy arose before section 538 was enacted, section 538 does not apply to these proceedings.

[3]The inventory in question was valued at $655,140. The assessed value of Star-Kist's total inventory for 1976-1977 was $5,699,300 upon which Star-Kist paid ad valorem taxes in the amount of $394,316.

[4]All statutory references are to the Revenue and Taxation Code unless otherwise indicated.

[5]Section 225 was repealed in 1984, Section 219 now exempts all business inventory from taxation. (Added by Stats. 1980, ch. 411, § 8, p. 801, urgency, eff. July 11, 1980, operative Jan. 1, 1981.)

Relying on *Zee Toys, Inc.* v. *County of Los Angeles* (1978) 85 Cal.App.3d 763 [149 Cal.Rptr. 750], hearing denied, January 17, 1979, affirmed without opinion by an equally divided court in *Sears, Roebuck and Co.* v. *County of Los Angeles* (1981) 449 U.S. 1119 [67 L.Ed.2d 106, 101 S.Ct. 933], in which the Court of Appeal held that section 225 violated the commerce clause and was void, the trial court denied plaintiff's refund claim. This appeal followed.

I

(1a) Before reaching the merits of defendants' charge that section 225 violates the commerce clause, we must determine whether defendants have "standing" to raise such a challenge to a state law. The term "standing" in this context refers not to traditional notions of a plaintiff's entitlement to seek judicial resolution of a dispute,[6] but to a narrower, more specific in-

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quiry focused upon the internal political organization of the state: whether counties and municipalities may invoke the federal Constitution to challenge a state law which they are otherwise duty-bound to enforce.

Counties and cities must look to the state Constitution and the Legislature for their creation and delegated powers. (Cal. Const., art. XI, §§ 1, 2.) (2) Counties are

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[6]One could argue that, in practical effect, defendants' willful compaign to supplant section 225's exemption by ignoring it and forcing plaintiff to bring a refund suit makes defendants the "true" plaintiffs in this controversy. Regardless of party designation, however, the threshold question as to whether the county and cities may challenge the statute remains the same.

"merely [] political subdivision[s] of state government, exercising only the powers of the state, granted by the state, created for the purpose of advancing 'the policy of the state at large . . . .' " (*County of Marin* v. *Superior Court* (1960) 53 Cal.2d 633, 638-639 [2 Cal.Rptr. 758, 349 P.2d 526].) (3) Though municipalities may enjoy a greater degree of autonomy with regard to local affairs. (*Wilson* v. *Beville* (1957) 47 Cal.2d 852, 858-859 [306 P.2d 789] [charter cities]), they too are subject to the sovereign's right to extend, withdraw or modify the powers delegated. (*Trenton* v. *New Jersey* (1923) 262 U.S. 182, 187 [67 L.Ed. 937, 941, 43 S.Ct. 534, 29 A.L.R. 1471]. See *People* v. *California Fish Co.* (1913) 166 Cal. 576, 606 [138 P. 79].)[7]

(4) This legislative control over cities and counties is reflected in the well-established rule that subordinate political entities, as "creatures" of the state, may not challenge state action as violating the entities' rights under the due process or equal protection clauses of the Fourteenth Amendment or under the contract clause of the federal Constitution. "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution

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[7]The California Constitution provides that, with limited exception, "[a]ll property is taxable . . ." (Cal. Const., art, XIII, § 1, subd. (a).) The Constitution further empowers the Legislature to "provide for property taxation of all forms of tangible personal property," and to "classify such personal property for differential taxation or for exemption." (Cal. Const., art. XIII, § 2.) The Legislature, in turn, has delegated responsibility for assessment, levy and collection of property taxes to local government. (Gov. Code, §§ 23004, subd. (e), 43000 et seq., 51501.) This delegated authority, however, does not include the power to originate a tax; only those taxes expressly authorized by statute may be assessed. (*County of Los Angeles* v. *Jones* (1939) 13 Cal.2d 554, 561-562 [90 P.2d 802].)

which it may invoke in opposition to the will of its creator. [Citations.]" (*Williams* v. *Mayor of Baltimore* (1933) 289 U.S. 36, 40 [77 L.Ed. 1015, 1020, 53 S.Ct. 431]. Accord *Newark v. New Jersey* (1923) 262 U.S. 192, 196 [67 L.Ed. 943, 946, 43 S.Ct. 539] [equal protection clause]; *Trenton, supra,* 262 U.S. at pp. 185-187 [67 L.Ed. at pp. 940-941] [contract clause and Fourteenth Amendment]; *Mallon* v. *City of Long Beach* (1955) 44 Cal.2d 199, 209 [282 P.2d 481] [contract clause]; *City of Los Angeles* v. *City of Artesia* (1977) 73 Cal.App.3d 450, 457 [140 Cal.Rptr. 684] [contract clause and due process clause].) This rule's application beyond Fourteenth Amendment and contract clause challenges remains unsettled.

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In *City of South Lake Tahoe* v. *California Tahoe* (9th Cir. 1980) 625 F.2d 231, certiorari denied, 449 U.S. 1039 [66 L.Ed.2d 502, 101 S.Ct. 619] (White, Marshall, JJ., dis.) the Ninth Circuit interpreted this "no standing" rule as absolutely barring political subdivisions from challenging state statutes on any federal constitutional ground. Regrettably, the *South Lake Tahoe* decision provides little guidance as to the court's reasoning in choosing a per se rule.

The plaintiffs in *South Lake Tahoe,* the city and individual city council members, brought an action of declaratory and injunctive relief, attacking the validity of certain land use regulations and transportation plans adopted by a regional planning agency on four separate constitutional grounds: the plans and regulations violated the Fifth and Fourteenth Amendments in arbitrarily discriminating between similarly situated landowners, violated the right to travel, resulted in the taking of property without just compensation and conflicted with regulations

of a congressionally approved bi-state planning agency in violation of the supremacy clause. The court rejected the city's claim of standing to raise the constitutional claims based on the regulation's injurious effects on its municipal finances. After noting that " '[p]olitical subdivisions may not challenge the validity of a sate statute under the Fourteenth Amendment,' " and pointing out that it makes no difference whether the challenge is to the state or to a political subdivision thereof, the court simply concluded, "[t]hus, the city may not challenge [the] plans and ordinances on constitutional grounds." (*South Lake Tahoe, supra,* 625 F.2d at p. 233.) The court also denied the individual council members standing for lack of a personal stake in the matter, remarking in passing: "[t]the councilmembers do not seek here to represent the City's interests; if they did their claims would be barred along with the City's." (*Id.,* at p. 237.)

Other courts have declined to read the "no stainding" rule as an absolute bar to federal constitutional challenges by political subdivisions. These courts have held that the rule does not extend to supremacy clause challenges to state laws. (*Rogers* v. *Brockette* (5th Cir. 1979) 588 F.2d 1057, cert. den., 444 U.S. 827 [62 L.Ed.2d 35, 100 S.Ct. 52]; *San Diego Unified Port Dist.* v. *Gianturco* (S.D.Cal. 1978) 457 F.Supp. 283, affd. 651 F.2d 1306, cert den., 455 U.S. 1000 [71 L.Ed.2d 866, 102 S.Ct. 1631]; *Triplett* v. *Tiemann* (D.Neb. 1969) 302 F.Supp. 1239; *Carlsbad Union School District of San Diego Country* v. *Rafferty* (S.D.Cal. 1969) 300 F.Supp. 434 affd. (9th Cir. 1970) 429 F.2d 337; *Douglas Independent School District No. 3* v. *Jorgenson* (D.S.D. 1968) 293 F.Supp. 849; *Hergenreter* v. *Hayden* (D.Kan. 1968) 295 F.Supp. 251.) *Rogers* and *Gianturco* provide meaningful insight into the purpose of the "no standing" rule and its one established exception.

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The *Rogers* court recognized a school district's standing to raise a supremacy clause challenge to a state law requiring a district with a substantial number of low income students to participate in a federally subsidized school breakfast program. The court also upheld the statute against the school district's challenge.

In resolving the standing question, the *Rogers* court studied the historic basis of the "no standing" rule and concluded that the rule has generally been applied in two types of cases: those in which the state has altered political subdivisions' boundaries (e.g., *Hunter* v. *Pittsburgh* (1907) 207 U.S. 161 [52 L.Ed. 151, 28 S.Ct. 40]), and those involving state modification of a benefit previously granted to a subdivision (e.g., *Trenton, supra,* 262 U.S. 182). (*Rogers, supra,* 588 F.2d at p. 1067.) The court then went on to suggest that ". . . these cases are substantive interpretations of the constitutional provisions involved" (*id.,* at p. 1068), and, as such, simply "adhere to the substantive principle that the Constitution does not interfere with a state's internal political organization." (*Id.,* at p. 1070.) Because there is no comparable limit on Congress' power to "interfere" in a state's internal political organization, the court concluded, a subdivision of the state may raise a claim that state law conflicts with federal law and is therefore void. (*Id.,* at pp. 1070-1071.)

The *Gianturco* court took a related, but somewhat different approach in reaching the conclusion that a political subdivision may invoke the supremacy clause despite its lack of capacity to raise other constitutional claims. In *Gianturco,* a port district operating an airport challenged a flight curfew imposed by the California Department of Transportation as violative of the supremacy clause in that the field was preempted by federal law.

Discussing the standing issue, the *Gianturco* court noted that a distinction between the supremacy clause and other constitutional provisions lies in the purpose served by each. Provisions like the Fourteenth Amendment and the contract clause "confer fundamental rights on individual citizens"; the supremacy clause, in contrast, "establishes a structure of government which defines the relative powers of states and the federal government." (*Id.*, 457 F.Supp. at p. 290.) Political subdivisions cannot assert "constitutional rights which are intended to limit governmental action vis-a-vis individual citizens" but may invoke the supremacy clause to challenge preempted state law. (*Ibid.*) Otherwise "such legislation and regulation often would go unchecked even though expressly prohibited by the Constitution." (*Ibid.*)

(1b) Accepting the *Rogers-Gianturco* rationale for exempting supremacy clause claims from the rule that political subdivisions cannot challenge state law on the basis of the federal Constitution, the question remains whether

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this type of commerce clause claim also falls outside the confines of the rule. Based on the similarity between the commerce clause and the supremacy clause, we conclude that it does.

The commerce clause empowers Congress "[t]o regulate commerce with foreign nations, and among the several states, and with Indian tribes." (U.S. Const., art. I, § 8, cl. 3.) (5) As the United States Supreme Court has long emphasized, " '[t]he Commerce Clause, even without implementing legislation by Congress is a limitation upon the power of the States.' " (*Boston Stock Exchange* v. *State Tax Comm'n* (1977) 429 U.S. 318, 328 [50 L.Ed.2d 514,

523, 97 S.Ct. 599], quoting *Freeman* v. *Hewit* (1946) 329 U.S. 249, 252 [91 L.Ed. 265, 271, 67 S.Ct. 274].) In this respect, the commerce clause resembles the supremacy clause in that it, albeit indirectly, "defines the relative powers of states and the federal government." (*Gianturco, supra,* 457 F.Supp. at p. 290.)

(1c) The defendants' claim in the instant case accents this definitional framework. Defendants assert that the foreign commerce tax exemption interferes with Congress' exclusive control over commerce by potentially nullifying the value of protective tariffs and by discriminating against domestic commerce. The discrimination is merely a side effect of the institutional intrusion. As noted in *Zee Toys, supra,* 85 Cal.App.3d 763, which involved an identical challenge to section 225, "[t]he only function of the discriminatory nature of the tax is to demonstrate its capacity to interfere with the authority of Congress over commerce. The interest herein sought to be protected is not personal to dealers in nonexempt interstate goods; *it relates more to the national interest in observing the boundaries of state and federal power.*" (*Id.,* at p. 778.) (Italics added.)

Viewing the commerce clause challenge in this light leads to the conclusion that political subdivisions might legitimately raise such claims. State action cannot be so insulated from scrutiny that encroachments on the federal government's constitutional powers go unredressed. In the present case, for example, there is a real possibility that the constitutionality of the Legislature's scheme of differential taxation of business inventories would have gone unchecked absent challenge by those entities charged with administration of the program. Moreover, because the foreign commerce exception precluded the local taxing agencies from taxing business inventories

they otherwise would have been authorized to tax, the agencies experienced significant revenue loss.[8] Thus, their interest in testing the constitutionality of the statute is unmistakable.

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We therefore conclude that defendants have standing to raise this commerce clause challenge. This result comports with the Legislature's implicit recognition of the right to raise federal constitutional claims in section 538, enacted in 1978. (*Ante,* fn. 2.) Section 538, the Legislature's direct response to Los Angeles County's refusal to implement section 225's exemption (Stats. 1978, ch. 1188, § 4, p. 3840), requires an assessor who believes a tax measure to be unconstitutional or otherwise invalid to seek declaratory relief to that effect, instead of simply imposing an assessment contrary to the questioned law. Because the statutory language speaks to unconstitutionality generally, without differentiating between the federal and state Constitutions, and the legislative history reflects a concern with the commerce clause challenge to section 225, it is reasonably likely that the Legislature did anticipate claims based upon the federal Constitution.

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[8]When section 225 was enacted, federal law precluded taxation of imports in their original containers. That restriction was abandoned in *Michelin Tire Corp.* v. *Wages* (1976) 423 U.S. 276 [46 L.Ed.2d 495, 96 S.Ct. 535]. Thus, the Legislature's assumption that under section 225 "the net loss of revenues to any local agency is not significant" (Stats. 1976, ch. 1126, § 4, p. 2746) did not prove to be correct. (See *Zee Toys, supra,* 85 Cal.App.3d at p. 783.)

II

(6a) We turn to the question whether section 225, in exempting only certain business inventories from ad valorem taxation, violates the commerce clause.

(7) The commerce clause reserves to Congress exclusive power "[t]o regulate commerce with foreign nations and among the several states . . ." (U.S. Const., art. I, § 8, cl. 3.) The clause does not, however, abrogate the " 'power of the states to tax for the support of their own governments.' " (*Boston Stock Exchange, supra,* 429 U.S. at p. 328 [50 L.Ed.2d at pp. 523-524], quoting *Gibbons* v. *Ogden* (1824) 22 U.S. (9 Wheat.) 1, 199 [6 L.Ed. 23, 71].) Determining whether a state tax exceeds the bounds of permissible state action under the clause is often a difficult task. As the United States Supreme Court noted in *Boston Stock Exchange,* ". . . when called upon to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers, the Court has counseled that the result turns on the unique characteristics of the statute at issue and the particular circumstances in each case." (*Id.,* 429 U.S. at p. 329 [50 L.Ed.2d at p. 524].)

(6b) As enacted, section 225 provided: "Personal property manufactured or produced, (1) outside this state and brought into this state for transshipment out of the United States or (2) outside of the United States and brought into this state for transshipment out of this state, for sale in the ordinary course of trade or business shall be exempt from taxation. The exemption under this section shall not apply to personal property in manufacturing process or production. Such process or production shall not include the breaking in bulk, labeling, packaging, relabeling, or repackaging.

of such property."[9] As all other business inventories were subject to ad valorem taxation (§ 201; former § 219 repealed by Stats. 1980, ch. 411, § 7), goods manufactured

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[9]The history of this exemption deserves mention. For over a century, states were prohibited from imposing even nondiscriminatory ad valorem taxes on imported goods while they retained their character as imports. (*Low* v. *Austin* (1872) 80 U.S. (13 Wall.) 29 [20 L.Ed. 517].) In 1972, this court held that imports could be taxed once removed from their original containers. (*Volkswagen Pacific* v. *City of Los Angeles* (1972) 7 Cal.3d 48 [101 Cal.Rptr. 869, 496 P.2d 1237].) The Legislature subsequently enacted section 225, presumably to countermand *Volkswagen Pacific*. Over 35 states have adopted similar "free port" laws, many of which extend tax-exempt status to stored imports. (*Japan Line, Ltd.* v. *County of Los Angeles, The Foreign Commerce Clause: An Economic Approach to the Negative Effects of State Taxation* (1980) 13 J. Mar. L.Rev. 793, 812.)

In 1976, the United States Supreme Court overruled *Low* and lifted the ban on state imposition of taxation on imported goods. In 1978, in *Zee Toys, supra,* 85 Cal.App.3d 763, section 225 was held to be unconstitutional. After this court denied hearing, the United States Supreme Court granted certiorari, ultimately affirming without opinion based on a four-to-four split. (*Sears, Roebuck & Co.* v. *County of Los Angeles* (1981) 449 U.S. 1119 [67 L.Ed.2d 106, 101 S.Ct. 933].)

In the meantime, Los Angeles County was the only county to disregard section 225 and assess taxes on imported goods in tax years 1976-1978. In 1978, on the basis of *Zee Toys,* the State Board of Equalization instructed the remaining counties to levy "escaped assessments" for the years in question. Once again the Legislature stepped in, and passed a protective measure prohibiting such escaped assessments for tax years prior to 1979-1980. (§ 225.3. Added by Stats. 1979, ch. 902, § 2, eff. Sept. 22, 1979; repealed by Stats. 1984, ch. 678, § 12.)

Finally, in 1981, the Legislature enacted section 219, prohibiting taxation of all business inventories. Thus, only a limited number of importers were assessed ad valorem taxes during section 225's limited lifespan.

in another state and transshipped through California to a third state were not entitled to the exemption. Thus, those domestic companies exclusively engaged in interstate commerce would be taxed, while those involved in exporting or importing would not be.

At first glance this distinction may not appear particularly troubling.[10] Taxation of foreign commerce has traditionally been off limits to the states. "Although [the commerce clause] grants Congress power to regulate commerce 'with foreign Nations' and 'among the several Sates' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater." (*Japan Line, Ltd.* v. *County of Los Angeles* (1979) 441 U.S. 434, 448 [60 L.Ed.2d 336, 347-348, 99 S.Ct. 1813]. See also *Michelin, supra,* 423 U.S. at p. 286 [46 L.Ed.2d at p. 503].) "Laws which concern the exterior relations of the United States with other nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the nation." (*Bowman* v. *Chicago & N. R. Co.* (1888) 125 U.S. 465 482 [31 L.Ed. 700, 706, 8.

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S.Ct. 689].) (8) Thus, a state tax scheme may not interfere with Congress' plenary power to regulate commerce with other nations.

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[10]See e.g., *Westinghouse Electric Corp.* v. *Tully* (1984) 466 U.S. 388, 406, footnote 12 [80 L.Ed.2d 388, 403, 104 S.Ct. 1856] ("We reiterate that it is not the provision of the [franchise tax] credit [for export income] that offends the Commerce Clause, but the fact that it is allowed on an impermissible basis, i.e., the percentage of a specific segment of the corporation's business that is conducted in New York.")

The United States Supreme Court's decision in *Japan Lines* reinforces this basic constitutional restriction. In *Japan Lines* the court struck down California's imposition of ad valorem tax on cargo containers owned by a foreign entity, used exclusively in international commerce and fully taxed in the domiciliary country. After emphasizing that "[w]hen construing Congress' power to 'regulate commerce with foreign Nations,' a more extensive constitutional inquiry is required" than that ordinarily employed in determining whether a tax unduly burdens interstate commerce (441 U.S. at p. 446 [60 L.Ed.2d at p. 346]), the court proceeded to identify two additional factors to be considered: the risk of multiple taxation and potential impairment of the nation's ability to "speak with one voice" in foreign affairs. (*Id.*, at pp. 446-449 [60 L.Ed.2d at pp. 346-348].) The court then held that application of the tax to instrumentalities of foreign commerce resulted in multiple taxation and interfered with federal uniformity in regulation of foreign trade, and, thus, violated the commerce clause. (*Id.*, at pp. 451-454 [60 L.Ed.2d at pp. 349-351].) The court acknowledged that this foreign commerce exemption might result in discrimination against domestic commerce, but concluded that Congress would have to resolve such "problems that admit only of a federal remedy." (*Id.*, at p. 457 [60 L.Ed.2d at p. 353].)

Japan Lines, however, does not support the proposition that any state tax on foreign commerce is per se invalid. In fact, in *Container Corp.* v. *Franchise Tax Bd.* (1983) 463 U.S. 159 [77 L.Ed.2d 545, 103 S.Ct. 2933] in which the court upheld California's "three-factor" formula for unitary tax assessments against a commerce clause challenge, the court stressed that the *Japan Lines* holding was limited to the narrow issue presented in the case: "'[W]hether instrumentalities of commerce that are

owned, based and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State.' " (*Container Corp., supra,* 463 U.S. at pp. 187-188, fn. 24 [77 L.Ed.2d at p. 568].) The court further implied that *Japan Lines* had gone too far in suggesting that the risk of multiple taxation alone would necessarily invalidate a state tax. The tax must be considered in context, including the feasibility of alternative modes of taxation, even if it actually results in multiple taxation. (*Id.,* at pp. 190-194 [77 L.Ed.2d at pp. 569-571].)

In addition, and of particular importance to our discussion, the *Container Corp.* court also refined the second prong of the *Japan Lines* test: whether

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the tax interfered with the federal government's ability to "speak with one voice" in foreign affairs. The court instructed: "In conducting this inquiry, . . . we must keep in mind that if a state tax merely has foreign resonances, but does not implicate foreign affairs, we cannot infer, '[a]bsent some explicit directive from Congress, . . . that treatment of foriegn income at the federal level mandates identical treatment by the States.' [Citations.] Thus, a state tax at variance with federal policy will violate the 'one voice' standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive." (*Container Corp., supra,* 463 U.S. at p. 194 [77 L.Ed.2d at pp. 571-572].)

Absent interference with such a directive,[11] nondiscriminatory ad valorem taxation of business inventories does

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[11]For example, imported goods stored in customs bonded warehouses [19 U.S.C. § 1557(a)) are immune from state taxation.

not intrude upon the federal government's foreign commerce power. In *Michelin, supra,* 423 U.S. 276 the court upheld, against an import-export clause challenge, Georgia's assessment of a nondiscriminatory ad valorem tax on imported goods stored as business inventory.[12] The court reasoned that because the purpose of such a property tax is to recover the costs, on an apportioned basis, of locally profided services such as police and fire protection, and the tax is imposed on all property regardless of origin, the tax could not be characterized as an "impost or duty" levied on imported goods. The tax was therefore valid.

In reaching the conclusion that a nondiscriminatory ad valorem tax could be imposed on all goods including imports, the court dismissed the concern that the tax somehow interfered with the federal government's commerce power. The court stressed: "It is obvious that such nondiscriminatory property taxation can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce, probably the most improtant purpose of the Clause's prohibition. By definition, such a tax does not fall on imports as such because of their place of origin. It cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation." (*Michelin, supra,* 323 U.S. at p.

(*Xerox Corp.* v. *County of Harris* (1982) 495 U.S. 145 [74 L.Ed.2d 323, 103 S.Ct. 523].)

[12] Although *Michelin* involved the import-export clause (U.S. Const., art. I, § 10, cl. 2) the court noted in *Japan Lines* that the import-export clause and the commerce clause reflect virtually indentical policies with regard to regulation ov commerce with foreign nations. (*Id.,* 441 U.S. at pp. 449-450, fn. 14 [60 L.Ed.2d at pp. 348-349].)

286 [46 L.Ed.2d at pp. 503-504].) The court further explained, "[t]he Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods, but it cannot be read to accord imported goods preferential treatment that permits escape from uni-

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form taxes imposed without regard to foreign origin for services which the State supplies. [Citation.]" (*Id.*, at p. 287 [46 L.Ed.2d at p. 504].)

Michelin teaches that nondiscriminatory ad valorem taxation of business inventories, including inventories linked to foreign commerce, is constitutional and has no impact on the federal government's foreign commerce power. Though we deal, in the instant case, not with imposition of the tax, but with an exemption, the *Michelin* rule is fully applicable. Because the tax itself has no bearing on the foreign commerce power, an exemption from that tax cannot look to the foreign commerce power for its legitimacy. Stated differently, the exemption cannot be necessary to preserve Congress' power to regulate foreign commerce if the tax itself does not interfere with the power to so regulate. The business inventories tax poses no threat to the federal government's ability to "speak with one voice" when regulating commerce with other nations. (6c) The exemption, then, which leaves in place a tax scheme that appears to discriminate against domestic commerce, cannot be sustained on the traditional ground that the states may not interfere with congressional power "to regulate commerce with foreign nations." (U.S. Const., art. I, § 8, cl. 3.)

Though the exemption cannot be justified as an attempt to protect the foreign commerce power, it can be challenged as interfering with that power. "Only the federal

government can fix the rules of fair competition when such competition is on an international basis." (*Bethlehem Steel Corp.* v. *Board of Commissioners* (1969) 276 Cal.App.2d 221, 226 [80 Cal.Rptr. 800].) As the *Zee Toys* court noted, "[t]he principal mode through which Congress has exercised [this] power . . . is by the imposition of import tariffs, designed for the most part to afford protection to United States manufactured goods threatened by foreign competition." (*Id.*, 85 Cal.App.3d at 774.) Taxation exemptions extended only to foreign goods may operate to nullify the curative effect of federally imposed tariffs. Conversely, when all goods located within a state are taxed on a nondiscriminatory basis for provided services, federal regulation of competition between interstate and foreign commerce is unimpeded by state policy. The nondiscriminatory tax "cannot be applied selectively to *encourage* or discourage any importation in a manner inconsistent with federal regulation." (*Michelin, supra,* 423 U.S. at p. 286 [46 L.Ed.2d at p. 504].) (Italics added.] Thus, the exemption may actually offend rather than preserve Congress' exclusive power to regulate foreign commerce.

Because Congress' foreign commerce power may not be invoked to curtail serious examination of the tax scheme in question, we must consider whether section 225's exemption results in discrimination against interstate commerce. "A tailored tax, however accomplished, must receive the careful

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scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce." (*Complete Auto Transit, Inc.* v. *Brady* (1977) 430 U.S. 274, 289, fn. 15 [51 L.Ed.2d 326, 337, 97 S.Ct. 1076].)

Typically, questions involving discrimination against interstate commerce arise in the context of favored treatment of intrastate commerce over interstate commerce.[13] (E.g., *Maryland* v. *Louisiana* (1981) 451 U.S. 725 [68 L.Ed.2d 576, 101 S.Ct. 2114]; *Lewis* v. *BT Investment Managers, Inc.* (1980) 447 U.S. 27 [64 L.Ed.2d 702, 100 S.Ct. 2009]; *Hughes* v. *Oklahoma* (1979) 441 U.S. 322 [60 L.Ed.2d 250, 99 S.Ct. 1727].) This juxtaposition is not exclusive however. For example, in *Boston Stock Exchange, supra,* 429 U.S. 318 the court concluded that a state tax statute that discriminated between two classes of interstate commerce (securities sales) was unconstitutional. Despite the rather unique nature of the instant case, the same analysis should apply.

(9) In *Complete Auto Transit, supra,* 430 U.S. 274, the court adopted a four-part test for determining whether a state tax imposed on interstate commerce will survive a commerce clause challenge. Such a tax is constitutional if it "... is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided." (*Id.,* at p. 279 [5] L.Ed.2d at p. 331].) Because a *nondiscriminatory* ad valorem personal property tax on business inventories would satisfy each of these requirements (see *Michelin, supra,* 423 U.S. 276) we need focus our inquiry only on the third prong of the test.

(6d) The exemption at issue not only removes the inventory of foreign companies transshipping through California from within the scope of the property tax, it

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[13] " 'The very purpose of the Commerce Clause was to create an area of free trade among the several States.' " (*Boston Stock Exchange, supra,* 429 U.S. at p. 328 [50 L.Ed.2d at 523].)

exempts domestic companies involved in importing or exporting as well. Star-Kist is a California corporation which transships goods manufactured outside the country through California for sale in other states. To the extent that domestic companies, like Star-Kist, can take advantage of section 225's tax exemption and thereby gain a competitive edge over domestic competitors operating exclusively within the United States, discrimination against a distinct class of interstate commerce is occurring. Thus the tax fails the *Complete Auto Transit* test of constitutionality.

As the *Michelin* court noted, "there is no reason why an importer should not bear his share of [the] costs [of state services] along with his competitors handling only domestic goods." (*Id.*, 423 U.S. 276, 287 [46 L.Ed.2d 495,

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504].) Viewing the exemption, as we must, " '. . . in light of its actual effect considered in conjunction with other provisions of the State's tax scheme' " (*Maryland* v. *Louisiana, supra,* 451 U.S. 725, 756 [68 L.Ed.2d 576, 601]), we conclude that the exemption constitutes an undue burden on interstate commerce in violation of the commerce clause.

The judgement is affirmed.

Bird, C. J., Mosk, J., Broussard, J., Grodin, J., and Uchiyama (Mikio), J.,* concurred.

LUCAS, J. — I respectfully dissent. Applying improper analysis, the majority incorrectly strikes down as viola-

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*Judge, Justice Court for the Fowler-Caruthers Judicial District of Fresno County, assigned by the Chairperson of the Judicial Council.

tive of the federal commerce clause (U.S. Const., art. I, § 8, cl. 3) former Revenue and Taxation Code section 225 which provided a tax exemption for business inventory of foreign origin or destination transshipped through California.[1] Although presently all business inventory is exempt from taxation (Rev. & Tax. Code, § 219) and former section 225 has been repealed (Stats. 1984, ch. 678, § 10, p. 188), I write separately because today's decision improperly precludes the Legislature from future use of this valid device to attract foreign commerce to California ports.

The commerce clause, investing in Congress the power "[t]o regulate commerce with foreign nations, and among the several States . . ." (U.S. Const., art. I, § 8, cl. 3) also acts, by its own force, as a limitation on state power. (*Boston Stock Exchange* v. *State Tax Comm'n* (1977) 429 U.S. 318, 328-329 (50 L.Ed. 2d 514, 523-524, 97 S.Ct. 599].) This limitation applies to laws implicating both the foreign and interstate components of the commerce clause, but has never been read as an absolute ban on the states' authority to enact legislation touching upon either the foreign or interstate commerce powers. (*Ibid.; Cooley* v. *Board of Wardens* (1852) 53 U.S. (12 How.) 299, 319 [13 L.Ed. 996, 1004].) As I will demonstrate, the statute at issue here, extending a business inventory exemption to importers and exporters transshipping through California while denying the exemption to interstate shippers, does not violate either of these implicit limitations on state power.

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[1]All further statutory references are to the Revenue and Taxation Code.

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I. *Foreign Commerce Clause*

Conceding that nondiscriminatory ad valorem taxes on foreign business inventories would have no impact on the federal government's foreign commerce power (*ante,* p. 13), the majority concludes that the section 225 exemption from this otherwise valid tax may actually offend that power, as it "may operate to nullify the curative effect of federally imposed tariffs." (*Ante,* p. 14.) I submit that such speculation is not sufficient to strike down an otherwise valid exercise of state power.

In *Japan Line, Ltd.* v. *County of Los Angeles* (1979) 441 U.S. 434, 449-450, footnote 14 [60 L.Ed.2d 336, 348-349, 99 S.Ct. 1813], the high court reiterated the three main policies used in federal commerce clause analysis: " '[T]he Federal Government must speak with one voice when regulating commercial relations with foreign governments . . . ; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be distrubed unless seabord States . . . were prohibited from levying taxes on [goods in transit].' " The exemption provided by former section 225 does not conflict with any of these concerns.

In *Container Corp.* v. *Franchise Tax Bd.* (1983) 463 U.S. 159, 193-194 [77 L.Ed.2d 545, 571, 103 S.Ct. 2933], the Supreme Court amplified upon the first policy concern identified in *Jpana Line,* inquiring whether the state legislation "impair[s] federal uniformity in an area where federal uniformity is essential" (*Japan Line, supra,* 441 U.S. at p. 448 [60 L.Ed.2d at p. 347]), preventing "the Federal Government from 'speaking with one voice' in international trade . . ." (*id.,* at p. 453 [60 L.Ed.2d at p.

351]). The *Container Corp.* court stated that merely because a state tax has "foreign resonances," it does not necessarily implicate foreign affairs; rather, violation of the "one voice" standard occurs if the state tax "*either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive." (*Container Corp., supra,* 463 U.S. at p. 194 [77 L.Ed.2d at pp. 571-572], italics in original.)

Container Corp. concerned, in part, whether application of California's "unitary business" principle to tax foreign subsidiaries violated the federal commerce clause. In concluding that the state's tax did not violate the "one voice" standard, the court found that the state tax did not implicate foreign policy by creating a threat of economic retaliation by other nations. Although recognizing foreign policy issues, other than economic retaliation could be implicated, the court noted that the absence of an amicus curiae brief by the Solicitor General raising such concerns, primarily the province

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of the executive branch and Congress, was some indication that no such other considerations were involved. (*Id.,* at pp. 195-196 [77 L.Ed.2d at p. 571].)

Analyzing whether the tax violated a "clear federal directive," termed "essentially a species of pre-emption analysis," the court observed that the existing tax treaties did not address state taxing powers, the regulation of which Congress had debated but chosen not to regulate. (*Id.,* at pp. 196-197 [77 L.Ed.2d at pp. 573-574].) The court concluded the California tax was thus not "pre-empted by federal law or *fatally* inconsistent with federal policy." (*Id.,* at p. 197 [77 L.Ed.2d at p. 573], italics

added.) The same conclusion should be reached regarding the exemption in the present case.

Primarily, the majority has failed to demonstrate how the tax exemption at issue affects any foreign policy. Clearly, the effect of this legislation would not offend our foreign trading partners. Rather, any equivalent "retaliation" by other nations, in the form of tax exemption for United States exports would be welcome. Additionally, we find the views of the Solicitor General as stated in *Sears Roebuck and Co.* v. *County of Los Angeles et al.* (1981) 449 U.S. 1119 [67 L.Ed.2d 106, 101 S.Ct. 933], persuasive evidence that former section 225 has not implicated any other foreign policy matters. In *Sears Roebuck and Co.* v. *County of Los Angeles et al., supra* 449 U.S. 1119, the Supreme Court reviewed a California Court of Appeal opinion finding former section 225 unconstitutional, and requested the Solicitor General to submit a brief on the matter. Responding to this request, the Solicitor General stated his view that the exemption *did not* violate the commerce clause. Though ultimately the Court of Appeal opinion was summarily affirmed by an equally divided court, the Solicitor General's opinion remains significant to the extent that it serves as an indication that the Executive Branch itself did not perceive former section 225 as interfering with foreign policy. (See *Container Corp., supra,* 463 U.S. at pp. 195-196 [77 L.Ed.2d at pp. 572-573].)

Neither does the challenged exemption violate a clear federal directive. Unlike *Japan Line,* where the court cited the Customs Convention on Containers (441 U.S. at p. 452 [60 L.Ed.2d at p. 350]), a specific directive in conflict with the state's taxing policy, the majority herein presents only the *possibility* that some hypothetical tariff may be impeded by the inventory exemption. Instead, like

the situation in *Container Corp.*, there is no indication either that by imposing a tariff, Congress has intended to occupy the field, precluding taxation or exemption, or that allowing the exemption would defeat the purposes of congressional action. Neither the Supreme Court nor Congress has ever required states to impose ad valorem taxes. Absent some concrete showing that the exemption is preempted by federal

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law, or "fatally inconsistent with federal policy." I would hold that this seemingly harmless exemption does not impair federal uniformity, preventing the federal government from "speaking with one voice" in international trade.

The exemption also cannot be found to conflict with the other major federal commerce clause concerns. Obviously, providing an exemption does not divert import revenues to the states. Moreover, unlike a tax imposed by a seaboard state which could adversely affect inland states, leading to disharmony, this tax exemption would not lead to interstate rivalry.[2] The tax exemption provided by former section 225 did not violate any of the policies forming the basis of the foreign commerce clause. Rather than impeding the flow of foreign commerce, this exemption, if anything, facilitated this channel of trade.

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[2]As the court noted in *Japan Line*, the concern of preserving harmony among the states requires essentially the same inquiry as whether a state tax interferes with interstate commerce (441 U.S. at p. 449, fn. 14 [60 L.Ed.2d at pp. 348-349]), a matter which we treat more fully *post*. (See *post*, pp. 7-9.)

II. *Interstate Commerce Clause*

Former section 225's exemption also may not be invalidated as interfering with *interstate* commerce. The majority applies the test of *Complete Auto Transit, Inc.* v. *Brady* (1977) 430 U.S. 274, 279 [51 L.Ed.2d 326, 331, 97 S.Ct. 1076], which is used to determine whether a state *tax* interferes with interstate commerce, to analyze whether this *exemption* unduly burdens interstate commerce. I submit that the application of *Complete Auto* in this wholly different context is erroneous.

The majority cites no case where *Complete Auto* is used to analyze whether a state tax exemption or credit violates the commerce clause. Moreover, the inappropriateness of applying *Complete Auto* in this context is further demonstrated when one attempts to apply the three parts of its four-part analysis which the majority does not discuss.[3] For example, it seems absurd to say that a state's choice not to impose a tax somehow violates the commerce clause unless the activity not taxed has a substantial nexus to that state. Likewise, it is difficult to imagine what commerce clause policy concerns are promoted by requiring that the exemption be "fairly apportioned" or "fairly related" to the services for which the state has chosen not to tax.

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[3]In *Complete Auto*, the high court stated that a state tax may be sustained "against a Commerce Clause challenge when [1] the tax is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." (430 U.S. at p. 279 [51 L.Ed.2d at p. 331].) The majority discusses only the third prong.

(See *ante*, p. 15.) These various factors relate to the propriety of *taxing* the in-state activity, assuring that the taxes are properly exacted for the services rendered by the state; the test was not designed to determine whether it is proper to *exempt* such property from tax.

The proper inquiry is whether the exemption statute, protecting only imports and exports, burdens the free flow of commerce among the several states. A recent United States Supreme Court case appears controlling. In *Westinghouse Electric Corp.* v. *Tully* (1984) 466 U.S. 388 [80 L.Ed.2d 388, 104 S.Ct. 1856], the State of New York, responding to federal tax legislation affecting "Domestic International Sales Corporations" (DISC), restructured its procedures for taxing distributions received by a parent corporation from its subsidiary. It also provided in part for a "partially offsetting tax credit," applied to DISC income from export products "shipped from a regular place of business of the taxpayer within [New York]." (*Id.*, at p. 393 [80 L.Ed.2d at p. 394].) The amount of the credit, applied to the parent corporation's tax obligation for business activity conducted in New York, was dependent not only on the amount of goods the DISC shipped from New York, but also upon the percentage of the DISC's shipping activity conducted in New York vis-à-vis other states.[4] Parent corporations with

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[4]Though computed according to a five-step formula (*id.*, at pp. 393-394 [80 L.Ed.2d at pp. 394-395]), the amount of the credit was, in essence, dependent upon the DISC's "export ratio." In other words, the credit otherwise applied to the New York DISC revenues attributable to the parent was further multiplied by the quotient derived from dividing DISC's New York gross receipts by the DISC's total gross receipts.

identical business allocation percentages (the percentage of its total business activity conducted in New York), and identical New York DISC income were taxed differently depending upon the amount of DISC income derived from shipping activities in other states. (*Id.*, at pp. 400-402, fn. 9 [80 L.Ed.2d at pp. 398-400].)

In analyzing whether "the method of allowing the credit is *discriminatory in a manner that violates the Commerce Clause* . . ." (*id.*, at p. 399 [80 L.Ed.2d at p. 398], italics added), the court focused on the fact that "not only does the New York tax scheme 'provide a positive incentive for increased business activity in New York State' . . . *it* [*also*] *penalizes* increases in the DISC's shipping activities in other States." (*Id.*, at pp. 400-401 [80 L.Ed.2d at p. 398].) The court also reiterated the settled principles that "'"[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States"'" (*id.*, at p. 402 [80 L.Ed.2d at p. 400]), and that "'[n]o State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by pro-

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viding a direct commercial advantage to local business."'" (*Id.*, at p. 403 [80 L.Ed.2d at p. 400].)

Acknowledging that in each case the court must balance the national interest in free trade with the state's interest in exercising its taxing powers (*id.*, at p. 403), the court found the principles enunciated in *Boston Stock Exchange, supra,* and *Maryland* v. *Louisiana* (1981) 451 U.S. 725 [68 L.Ed.2d 576, 101 S.Ct. 2114], controlling.[5]

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[5]In *Maryland* v. *Louisiana, supra,* the court struck down Louisiana's "First-Use" tax statute, imposing a tax on natural gas brought into the state, while providing exemptions and credits to local users, as "unquestionably discriminating against interstate commerce in

In both cases, the court struck down state statutes imposing greater economic burdens on similar activities occurring out-of-state than occurring in-state. The court concluded that the New York tax credit violated the commerce clause because it " 'foreclose[d] tax-neutral decisions and . . . create[d] . . . an advantage' for firms operating in New York *by placing 'a discriminatory burden on commerce to its sister States.'* [Citation.]" (*Westinghouse Electric, supra,* 466 U.S. at p. 406 [80 L.Ed.2d at p. 402], italics added.)[6]

Nonetheless, the *Westinghouse Electric* court hastened to add that not all schemes to attract a particular segment of industry into a state are unconstitutional. The court stated: "We reiterate that it is not the provision of the credit that offends the Credit Clause, but the fact that it is allowed on an impermissible basis, i.e., the percentage of a specific segment of the corporation's business that is conducted in New York. As in *Boston Stock Exchange,* we do not 'hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy. *We hold only that in the process of competition no State may*

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favor of local interests." (*Id.,* at p. 756 [68 L.Ed.2d at p. 602].) Likewise in *Boston Stock Exchange, supra,* the court found violative of the commerce clause a stock transfer tax reducing the tax burden on nonresidents engaged in in-state (but not out-of-state) sales of stock, and creating a maximum tax limit for all stock buyers for purchases made in-state (but not out-of-state). The court found the tax unconstitutional because it "discriminates between two types of interstate transactions *in order to favor local commercial interests over out-of-state businesses* . . ." (*id.,* at p. 335 [50 L.Ed.2d at p. 528], italics added), concluding that a state may not build up its own commerce by burdening businesses in other states. (*Ibid.*)

[6]Significantly, the court did not cite or apply *Complete Auto* in either *Westinghouse Electric* or *Maryland* v. *Louisiana, supra.*

discriminatorily tax the products manufactured or the business operations performed in any other State.' " (*Id.*, at pp. 406-407, fn. 12 [80 L.Ed.2d at p. 403], italics added.)

The tax exemption granted by former section 225 to attract commerce to California ports was not grounded on an "impermissible basis." There was

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no penalty imposed on activity conducted outside of California. Shippers not wishing to pay the inventory tax, levied as a quid pro quo for the services rendered by California, simply may have chosen to transship through another state. Unlike *Boston Stock Exchange, Westinghouse Electric*, and *Maryland* v. *Louisiana, supra*, no burden was imposed on interstate commerce by placing a penalty or disincentive on the choice to transact business in another state. Moreover, unlike the paradigm commerce clause case, local interests are not favored. (See *Westinghouse Electric, supra*, 466 U.S. at p. 403 [80 L.Ed.2d at p. 400].) The exemption is available regardless of the residency of the shipper or the place of manufacture of the goods, with the exception of those goods whose point of origin is California which do not qualify for the exemption because they are not being "transshipped" *through* California.

In my view, respondents' claim at bottom is really an equal protection attack. They are complaining in essence that the state's differential treatment of import and export business inventories from that of domestic goods lacks a rational basis. Assuming respondents would have standing to raise this issue, an unlikely conclusion under the majority's analysis (see *ante*, p. 6), I submit that former section 225 would by upheld against such a challenge because the distinction it draws " 'is neither capricious nor arbitrary, and rests upon some reasonable

consideration of difference or policy . . . .' " (*Allied Stores of Ohio* v. *Bowers* (1959) 358 U.S. 522, 527 [3 L.Ed.2d 480, 485, 79 S.Ct. 437] [upholding against an equal protection clause challenge an Ohio statute providing only *nonresidents* an exemption for merchandise held in storage, from a tax otherwise imposed on "[a]ll personal property located and used in business in the state"].)

One such reasonable policy consideration may be the greater threat of business flight from California posed by importers and exporters rather than by those dealing in interstate commerce, which justifies a greater incentive for the former group. (See *Zee Toys, Inc.* v. *County of Los Angeles* (1978) 85 Cal.App.3d 763, 776 [149 Cal.Rptr. 750].) In any event, the Legislature was not required to expressly state these policy considerations. The statute would not violate the equal protection clause "if any state of facts reasonably can be conceived that would sustain it. [Citations.]" (*Allied Stores, supra*, 358 U.S. at p. 528 [3 L.Ed.2d at p. 486].)

The exemption provided by former section 225 does not run contrary to the limitations on state power implicit in either the foreign or interstaate components of the commerce clause. The exemption neither interferes with the federal government's ability to speak with one voice when regulating commercial relations with foreign governments, nor does it burden the free flow of interstate commerce by imposing a penalty on business activity con-

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ducted outside of California. I would find the tax exemption constitutional and would reverse the trial court's ruling denying plaintiff's claim for a refund of the improperly levied inventory tax.

APPENDIX B

No. 78-1577

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1978

SEARS, ROEBUCK AND CO., PETITIONER

v.

COUNTY OF LOS ANGELES AND CITY OF COMPTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General
M. CARR FERGUSON
Assistant Attorney General
STUART A. SMITH
Assistant to the Solicitor General
ERNEST J. BROWN
Attorney
Department of Justice
Washington, D.C. 20530

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IN THE SUPREME COURT OF THE
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OCTOBER TERM, 1978

No. 78-1577

SEARS, ROEBUCK AND CO., PETITIONER

v.

COUNTY OF LOS ANGELES AND CITY OF COMPTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation of June 4, 1979.

OPINIONS BELOW

The order of the trial court is not officially reported. The opinion of the Court of Appeal (Pet. App. 1-29) is reported at 85 Cal.App. 3d 763. The denial by the Supreme Court of California of a petition for hearing (Pet. 2) is reported at 149 Cal. Rptr. 764.

JURISDICTION

The decision of the Court of Appeal was entered on October 25, 1978 (Pet. 2; Pet. App. 1). The Supreme Court of California denied petition for hearing on January 17, 1979 (Pet. 2). The petition for a writ of certiorari was filed on April 16, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

The United States will discuss the following question: Whether the California property tax exemption for personalty manufactured or produced (1) outside California and brought into the State for transshipment out of the United States; or (2) outside of the United States, and brought into California for transshipment out of the State, for sale in the ordinary course of trade or business, is invalid under the Commerce Clause of the United States Constitution.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article I. Section 8, Clause 3 of the United States Constitution provides: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".

Sections 225 and 225.1 of the Cal. Rev. & Tax. Code (West), enacted by 1975 Cal. Stats., ch. 1126, at 2746, §§ 1 and 2, during the period here involved[1] provided as follows:

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[1]Although Section 225.1 of the Cal. Rev. & Tax. Code (West) was repealed by 1977 Cal. Stats., ch. 246, § 4, its provisions were simultaneously reenacted as Section 253.10 of the Rev. & Tax. Code, by 1977 Cal. Stats., ch. 246, § 7.

§ 225. *Personalty brought into state for transshipment outside state or United States; exemption*

Personal property manufactured or produced, (1) outside this state and brought into this state for transshipment out of the United States, or (2) outside of the United States and brought into this state for transshipment out of this state, for sale in the ordinary course of trade or business shall be exempt from taxation. The exemption under this section shall not apply to personal property in manufacturing process or production. Such process or production shall not include the breaking in bulk, labeling, packaging, relabeling, or repackaging of such property.

§ 225.1. *Method of Claiming transshipment exemption*

A person claiming the transshipment exemption under Section 225 may either claim this exemption by (1) a percentage method of determining property held for transshipment on hand at a particular location by allocating a portion of the total inventory, using the percentage determined by dividing the total out-of-state shipments by the taxpayer from that location during the preceding year by the total of such shipments from that location during such year, or (2) an actual method as evidenced by contracts of sale on the tax lien date, and a full, true and correct inventory of all property held for transshipment together with the date of receipt of the same, the date of withdrawal of the same, the point of origin thereof, and the point of ultimate destination thereof.

STATEMENT

Petitioner brought this suit for refund of ad valorem personal property taxes paid under protest to the County of Los Angeles and the City of Compton.

The facts were stipulated (Pet. App. 1-2, 4) and may be summarized as follows: Petitioner is engaged in the business of selling goods at retail, both in California and elsewhere. On March 1, 1976, the tax lien date for purposes of the annual California ad valorem tax on personal property, petitioner held tangible personal property in warehouses in the County of Los Angeles and City of Compton. The property in question had been manufactured or produced outside the United States, and had been imported by petitioner and placed in warehouses for distribution both within and without California for purposes of sale in the ordinary course of petitioner's business. Petitioner's distribution warehouses in the County of Los Angeles were devoted almost entirely to goods imported from foreign countries, particularly from locations in the Pacific area. The rate of turnover at the warehouses averaged approximately three times per year. Petitioner intended to ship the goods as quickly as its distribution operations permitted. Pursuant to Sections 225 and 225.1 of the California Revenue and Taxation Code, petitioner applied to the total amount of goods manufactured or produced outside the United States and held in its warehouses in Los Angeles County on March 1, 1976, the fraction represented by the out-of-state shipments from those locations during the preceding year divided by the total shipments from those locations during that year. Petitioner accordingly claimed a transshipment property tax exemption for property having a value of $19,373,089 (Pet. App. 1-3, 4-5).

Respondents denied the claimed exemption. They asserted (1) that properly construed, Section 225 exempted only goods in transit through the State, and (2) that even if Section 225 were construed to exempt imported goods held in the State by the owner for disposal or use, it would violate the United States Constitution by regulating interstate and foreign commerce in interfering with foreign affairs, because it extended no exemption to interstate goods. Petitioner thereupon paid the tax under protest and instituted this action for refund in the Superior Court of Los Angeles County. The Superior Court upheld petitioner's claimed exemption (Pet. App. 1-2, 5-6).

The Court of Appeal reversed (Pet. App. 29). Although it rejected respondents' statutory argument that Section 225 applied only to goods "in transit" (Pet. App. 7-10), it held that the statutory exemption of foreign goods regulated interstate and foreign commerce and was therefore invalid under the Commerce Clause of the United States Constitution (Pet. App. 6, 10-18). It also suggested that the exemption interfered with the power of the Congress to impose tariffs (Pet. App. 15-16). In the Court of Appeal's view, the statutory exemption gave goods of foreign origin a competitive advantage over goods manufactured in other states and brought to California for transshipment in interstate commerce. It concluded that "state taxes which discriminate between classes of interstate and foreign goods on the basis of their origin are not permitted" (Pet. App. 14). With three Justices dissenting, the Supreme Court of California denied a petition for hearing (Pet. 2).

ARGUMENT

In holding that the California property tax exemption for foreign goods destined for interstate commerce or out-of-state goods destined for export violates the Commerce Clause of the Constitution and interferes with Congress' power to impose tariffs, the Court of Appeal misinterpreted the decisions of this Court.

1. Section 225 of the California Revenue and Taxation Code exempts from taxation while held in California, imported goods destined for other states and goods from other states destined for export. It does not, however, exempt domestic goods destined for interstate commerce. On the authority of this Court's decision in *Boston Stock Exchange* v. State Tax Comm'n, 429 U.S. 318 (1977), the Court of Appeal held that the statute unconstitutionally discriminated against interstate commerce and therefore violated the Commerce Clause. But *Boston Stock Exchange* has no bearing on the question presented in this case. The prohibited discrimination in that case was one that provided "a direct commercial advantage to local business" by virtue of "laws that favor local enterprise at the expense of out-of-state business" (429 U.S. at 329) by taxation "in a manner that discriminates between two types of interstate transactions in order to favor local commercial interests over out-of-state business" (*id.* at 335).

Here, in contrast, the statutory property tax exemption did not favor local business at the expense of out-of-state business. It favored imports and exports.[2] There is, however, no constitutional prohibition against favoring im-

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[2]Cf. *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522 (1959). There, the issue was addressed under the Equal Protection Clause of the Fourteenth Amendment rather than under the Commerce Clause.

ports over domestic goods. The Import-Export Clause of the Constitution itself makes such a differentiation. The decisions of this Court have therefore consistently held invalid state statutes that have had an adverse impact upon foreign nationals or upon foreign commerce.[3] Nor does the Commerce Clause require a different result. As this Court reaffirmed in *Washington Rev. Dept.* v. *Stevedoring Assn.*, 435 U.S. 734, 751 (1978), "[T]he Import-Export Clause states an absolute ban, whereas the Commerce Clause merely grants power to Congress." See also *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69, 75 (1946).

When only the Commerce Clause is involved, this Court only last Term in *Japan Line, Ltd.* v. *County of Los Angeles*, decided April 30, 1979 (No. 77-1378), explicitly rejected the premise that "Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved. * * * When Construing Congress' power to 'regulate Commerce with foreign Nations,' a more extrensive constitutional inquiry is required." (Slip op. 11-12). *Japan Line* held that shipping containers employed in foreign commerce, based and owned in Japan, were not subject to the apportioned property taxation to which domestic shipping containers engaged in

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[3]See, *e.g.*, *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796); *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813); *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419 (1827); *Henderson* v. *Mayor of New York*, 92 U.S. 259 (1875); *Chy Lung* v. *Freeman*, 92 U.S. 275 (1875); *Hauenstein* v. *Lynham*, 100 U.S. 483 (1879); *People* v. *Compagnie Gen. Transatlantique*, 107 U.S. 59 (1882); *Asakura* v. *Seattle*, 265 U.S. 332 (1924); *Nielsen* v. *Johnson*, 279 U.S. 47 (1929); *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940); *Hines.* v. *Davidowitz*, 312 U.S. 52 (1941); *Kolovrat* v. *Oregon*, 366 U.S. 187 (1961); *Hostetter* v. *Idlewild Liquor Corp.*, 377 U.S. 324 (1964); *Dept. of Revenue* v. *James Beam Co.*, 377 U.S. 341 (1964); *Zschernig* v. *Miller*, 389 U.S. 429 (1968).

interstate commerce would have been subject.[4] Although this Court in *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), held that a state was not constitutionally required to exempt imports held in the original package from generally imposed property taxation, nothing in the decision suggested that the exemption that had previously been constitutionally required under decisions overruled by *Michelin Tire* was thereafter constitutionally prohibited.

As the Court in *Michelin Tire* pointed out (423 U.S. at 283-294), the considerations underlying the Import-Export Clause were that the federal government speak with one voice in regulating commercial regulations with foreign governments, that import revenues not be diverted to the states, and that seaboard states with ports of entry not be permitted to be toll-takers at the expense of states not situated as favorably geographically. The California statute serves all of these purposes. The fact that it serves and advances constitutional policy somewhat more fully than the minimum required of the state[5] does not justify the Court of Appeal's ruling that it violates the Commerce Clause.

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[4]See *Ott* v. *Mississippi Barge Line*, 336 U.S. 169 (1949); *Braniff Airways* v. *Nebraska State Board*, 347 U.S. 590 (1959).

[5]Even before the *Michelin Tire* decision, the California exemption was somewhat broader than the minimum then constitutionally required. By its terms, the exemption for imports persisted beyond the original package, for it permitted breaking bulk, repackaging, etc. With regard to goods held for export, it granted exemption prior to movement in the stream of exportation, as defined by this Court's decisions in *Empresa Siderurgica* v. *Merced Co.*, 337 U.S. 154 (1949) and *Joy Oil Co.* v. *State Tax Comm'n.*, 337 U.S. 286 (1949). It is not questioned, however, that the goods exempted from tax were goods that had been imported and goods that were subsequently exported.

During the more than 100 years prior to the *Michelin Tire* decision, while the rule of *Low* v. *Austin*, 80 U.S. (13 Wall.) 29 (1871), and *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945), required exemption of imported goods in original packages from generally imposed state property taxes, the Court consistently held that goods that had moved in interstate commerce in their original packages enjoyed no comparable exemption.[6] When the Court overruled *Low and Hooven*, it was not on the basis of any discrimination favoring imports over goods in interstate commerce, but only because the considerations that gave rise to the Import-Export Clause did not require exemption. Nothing in *Michelin Tire* suggested that the pre-existing exemption was now to be constitutionally prohibited.[7]

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[6] *Woodruff* v. *Parham*, 75 U.S. (8 Wall.) 123 (1868); *Brown* v. *Houston*, 114 U.S. 622 (1885); *American Steel & Wire Co.* v. *Speed*, 192 U.S. 500 (1904); *Sonneborn Bros.* v. *Cureton*, 262 U.S. 506, 509, 510-513 (1923); *Wiloil Corp.* v. *Pennsylvania*, 294 U.S. 169 (1935).

[7] Indeed, in contexts other than property taxes on goods in the original package, the Court has treated imports or exports markedly differently from goods shipped in interstate commerce. Compare *Dept. of Revenue* v. *James Beam Co.*, 377 U.S. 341 (1964) and *Hostetter* v. *Idlewild Liquor Corp.*, 377 U.S. 324 (1964) with *State Board* v. *Young's Market Co.*, 299 U.S. 59 (1936) and *Brewing Co.* v. *Liquor Comm'n*, 305 U.S. 391 (1939); *Crew Levick Co.* v. *Pennsylvania*, 245 U.S. 292 (1917) with *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938); *Carson Petroleum Co.* v. *Vial*, 279 U.S. 95 (1929) with *General Oil Co.* v. *Crain*, 209 U.S. 211 (1908), *Bacon* v. *Illinois*, 227 U.S. 504 (1913), and *Minnesota* v. *Blasius*, 290 U.S. 1 (1933).

Carson Petroleum Co. v. *Vial*, *supra*, may have been heavily qualified by the decision in *Joy Oil Co.* v. *State Tax Comm'n*, 337 U.S. 286 (1949), as the dissent in the latter case asserted (337 U.S. at 291-292). But the result in *Carson Petroleum* was distinguished from other contemporary decisions principally by the fact that the oil involved was destined for export (see 279 U.S. at 106-109).

In sum, the decisions of this Court involving imports, exports, and foreign commerce uniformly emphasize that one of the principal purposes of the Constitution was to assure that the states did not impede or obstruct importation, exportation, or foreign commerce. The Court in *Michelin Tire* overruled *Low* v. *Austin* only when it was demonstrated that application of a generally imposed property tax to imports in the original package did not substantially impede importation or foreign commerce. *Washington Rev. Dept.* v. *Stevedoring Assn.*, 435 U.S. 734, 751-755 (1978). By favoring imports and exports, Section 225 of the California Revenue and Taxation Code facilitates importation and exportation and assures that imports and exports passing through the state will not be impeded even to the extent of the impact of a generally applicable property tax. While such action may not be constitutionally required, it is not, as the decision below erroneously held, constitutionally prohibited. Nothing in the Commerce Clause prevents a state from favoring imports and exports beyond the extent required by the Import-Export Clause.

2. a. In further support for its invalidation of the statutory exemption for imported goods, the Court of Appeal suggested (Pet. App. 15-16) that Section 225 impedes the power of the Congress to determine the effective tariff applicable to imported goods. But this reasoning is contrary to this Court's analysis in *Michelin Tire*. In considering the effect of removing the exemption for imported goods required by earlier decisions, the Court pointed out (423 U.S. at 287): "It may be that such taxation could diminish federal impost revenues to the extent its economic burden may discourage purchase or importation of foreign goods. The prevention or avoidance of this incidental effect was not, however, even remotely an objective of the Framers in enacting the prohibition."

b. Furthermore, Sections 4271 and 4272 of the Internal Revenue Code of 1954 show that the California exemption for imports and exports is entirely consistent with congressional policy. Section 4271 imposes a tax of 5 percent upon the amount paid for transportation of property by air, but Section 4272(a) limits this to "transportation by air which begins and ends in the United States." Section 4272(b) excludes from tax, under regulations prescribed by the Secretary, "transportation of property in the course of exportation * * * by continuous movement, and in due course so exported."

Under Treasury Temporary Regulations in Connection with the Airport and Airway Revenue Act of 1970 (26 C.F.R.), Section 154.2-1(c)(1) and (2), transportation will be considered to begin and end at the points of origin and destination as shown by a through airwaybill, or, if no such airwaybill has been issued, then the export or import character of the shipment may be shown by a contract or other written evidence showing the beginning point and ending point of air transportation. And Section 154.2-1(c)(1) of the Regulations is explicit in providing that transportation from a point outside the United States to a point inside the United States will not be considered broken "even though there may be stopovers in the United States (such as, for example, to consolidate cargo at a 'gateway' city)."

With regard to exports, the tax is not applicable to the segment of air transportation in the United States even though the mode of transportation in export is other than by air. Section 154.2-1(d)(1) of the Regulations provides:

> For example, the tax does not apply to air transportation from Chicago to New York if the property is in the course of exportation, by continuous movement, by boat from New York to Europe and in due course

> is so exported. Delays caused by circumstances beyond the control of the shipper (such as labor disputes or natural disasters) will not interrupt continuous movement. Property arriving at a gateway city by air may be repacked or consolidated with other property without interrupting continuous movement.

Under Section 154.2-1(d)(3) of the Regulations, payment of the tax may be deferred for six months to establish the fact of export "in due course" within that period. Proof of export received after six months will establish a ground for refund of the tax paid.

The foregoing provisions show that even when the facilities of the airways of the United States are employed,[8] Congress has exempted from the air transportation excise tax goods that are in fact imports and exports, and has provided flexible rules permitting stopovers, repackaging, and consolidation of cargo in the course of movement without loss of exemption. California's removal of property tax burdens upon imports and exports is therefore entirely consistent with congressional policy.

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[8]Cf. *Massachusetts* v. *United States*, 435 U.S. 444 (1978).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

M. CARR FERGUSON
Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

ERNEST J. BROWN
Attorney

August 1979

APPENDIX C

[152 Cal.App.3d 258]

[Civ. No. 69023. Second Dist., Div. One. Feb. 23, 1984.]

STAR-KIST FOODS, INC., Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.

OPINION

SPENCER, P. J. —

INTRODUCTION

Plaintiff Star-Kist Foods, Inc. (Star-Kist) appeals from a judgment denying its request that the court order defendants, County of Los Angeles, City of Los Angeles and City of Long Beach, to refund ad valorem taxes paid by plaintiff.

STATEMENT OF FACTS

Plaintiff seeks the refund of ad valorem taxation levied upon tangible personal property, inventories of canned tuna fish, in plaintiff's possession on March 1, 1976. The property had been produced outside the United States, brought into California for shipment out of California, stored at various locations within California for eventual shipment out of California and was for sale in the ordinary course of trade or business.

At trial, plaintiffs based their claim for refund due on Revenue and Taxation Code section 225; section 225 exempts from taxation "property manufactured or produced . . . (2) outside of the United States and brought into this state for trans-shipment out of this state, for sale

in the ordinary course of trade or business. . . ."[1] In denying plaintiff's claim, the trial court relied on *Zee Toys, Inc. v. County of Los Angeles* (1978) 85 Cal.App.3d 763 [149 Cal.Rptr. 750] in which two cases were consolidated,

[152 Cal.App.3d 262]

Zee Toys, Inc. v. County of Los Angeles and *Sears, Roebuck & Co. v. County of Los Angeles.* In *Zee Toys,* this district determined the County of Los Angeles had standing to assert that section 225 violated the federal constitution and that section 225 did, in fact, violate the federal commerce clause.[2] The *Zee Toys* decision nullified the exemption provided by section 225.

The California Supreme Court denied a petition for hearing on *Zee Toys* by a vote of four to three; *Zee Toys* did not pursue the matter beyond the California Supreme Court. Sears, Roebuck and Company's petition for writ of certiorari in the United States Supreme Court, however, was granted. A per curiam decision was rendered, affirming the California appellate opinion by a four-to-four vote. (*Sears, Roebuck & Co. v. County of Los Angeles* (1980) 446 U.S. 915 [64 L.Ed.2d 269, 100 S.Ct. 1848].)

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[1]Los Angeles County taxpayers were required to pay the tax despite the exemption; in no other counties were taxpayers similarly taxed.

[2]Article I, section 8, clause 3 of the United States Constitution provides Congress with the power "[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes."

CONTENTION

Plaintiff contends the trial court erroneously denied its request for refund due on the basis of the decision in *Zee Toys, Inc.* v. *County of Los Angeles, supra,* 85 Cal.App.3d 763.

DISCUSSION

(1a) Plaintiff asserts defendants' standing to raise the issue of the unconstitutionality of Revenue and Taxation Code section 225 is barred by the well established rule "[a] municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." (*Williams* v. *Mayor* (1933) 289 U.S. 36, 40 [77 L.Ed. 1015, 1020, 53 S.Ct. 431]; *Newark* v. *New Jersey* (1923) 262 U.S. 192, 196 [67 L.Ed. 943, 946, 43 S.Ct. 539].) If the only ground for defendants' standing was its desire to vitiate a statute purportedly unconstitutional, we would agree. On the facts of the case at bar, however, defendants are entitled to be heard, for they have demonstrated a direct economic injury.

(2) Our conclusion is based on the essence of the question of standing, i.e., whether a litigant is able to allege a "personal stake in the outcome." (*Baker* v. *Carr* (1962) 369 U.S. 186, 204 [7 L.Ed.2d 663, 678, 82 S.Ct. 691].) Standing is awarded to the party who is able to allege "injury in fact." (*Schlesinger* v. *Reservists to Stop the War* (1974) 418 U.S. 208, 218 [41 L.Ed.2d 706, 717, 94 S.Ct. 2925].) In this state, standing is awarded

to the party who alleges "facts sufficient to establish status as a 'real party in interest.' " (*Mendoza* v. *County of Tulare* (1982) 128 Cal.App.3d 403, 414 [180 Cal.Rptr. 347], quoting from *Friendly Village Community Assn., Inc.* v. *Silva & Hill Constr. Co.* (1973) 31 Cal.App.3d 220, 224 [107 Cal.Rptr. 123].)

(1b) The claim asserted by defendants here differs substantially from that of the "generalized interest of all citizens in constitutional governance." (*Schlesinger* v. *Reservists to Stop the War, supra,* 418 U.S. 208, 217 [41 L.Ed.2d 706, 716].) Defendants seek neither privilege nor immunity and are, therefore, not barred from standing by the *Williams* v. *Mayor* rationale cited *ante.*

For defendants, compliance with Revenue and Taxation Code section 225 results in the loss of significant revenue in the form of tax dollars. Defendants stand to suffer a direct economic injury, therefore, should we, for any reason, conclude plaintiff is entitled to a tax refund. Faced with the loss of revenue resulting from the operation of section 225, defendants are surely "real part[ies] in interest." (*Mendoza* v. *County of Tulare, supra,* 128 Cal.App.3d 403, 414.) Such loss has been recognized as an alternate ground for standing by no less an authority than the United States Supreme Court in *Board of Education* v. *Allen* (1968) 392 U.S. 236, 241, footnote 5 [20 L.Ed.2d 1060, 1064, 88 S.Ct. 1923]. (See *City of South Lake Tahoe* v. *California Tahoe* (1980) 449 U.S. 1039, 1040, fn. 1 [66 L.Ed.2d 502, 508, 101 S.Ct. 619] (dis. opn. of White, J.).)

(3a) Having recognized defendants' standing to question the constitutionality of Revenue and Taxation Code section 225, we direct our attention to the propriety of the

conclusion reached in *Zee Toys, Inc.* v. *County of Los Angeles, supra,* 85 Cal.App.3d 763. Primarily on the basis of United States Supreme Court decisions and the court's articulation of rationale in support thereof rendered subsequent to *Zee Toys,* we find cause to reach a contrary conclusion; i.e., the exemption provided by section 225 does not violate the commerce clause of the United States Constitution and is, therefore, not unconstitutional.

(4) Initially, we note that the conclusion reached herein is not barred by the Supreme Court's affirmance in *Sears, Roebuck and Co.,* as "an affirmance by an equally divided court [is not] entitled to precedential weight. [Citation.]" (*Neil* v. *Biggers* (1972) 409 U.S. 188, 192 [34 L.Ed.2d 401, 407, 93 S.Ct. 375].) Thus, we do not construe the decision in *Sears, Roebuck and Co.* as requiring a finding that section 225 is unconstitutional. Our reasons for upholding the constitutionality of the contested section are cited below.

[152 Cal.App.3d 264]

(5) The Supremacy clause of the United States Constitution provides "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land. . . ." (U.S. Const., art. VI, cl. 2.) The laws of California, therefore, must not conflict with either the commerce clause or the import-export clause.[3] However, "the constitution imposes no single formula on the States." (*Container Corp. v. Franchise Tax Bd.* (1983) — U.S. —, —. [77 L.Ed.2d 545, 552, 193 S.Ct. 2933]) Regardless of whether the

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[3]Article I, section 10, clause 2 of the United States Constitution precludes any state from laying "Imposts or Duties on Imports or Exports. . . ."

validity of a state regulation is measured by the commerce clause or the import-export clause, the need for uniformity in commercial relations with foreign governments is well established. (*Japan Line, Ltd. v. County of Los Angeles* (1979) 441 U.S. 434, 449 [60 L.Ed.2d 336, 348, 99 S.Ct. 1813]; *Michelin Tire Corp. v. Wages* (1976) 423 U.S. 276, 285 [46 L.Ed.2d 495, 503, 96 S.Ct. 535].) When dealing with tax measures, however, the state is to be afforded great latitude. (*Haman v. County of Humboldt* (1973) 8 Cal.3d 922, 925 [106 Cal.Rptr. 617, 506 P.2d 993].) In certain instances, the state may favor a given class. (*Stebbins v. Riley* (1925) 268 U.S. 137, 142 [69 L.Ed. 884, 888, 45 S.Ct. 424, 44 A.L.R. 1454] *Haman v. County of Humboldt, supra,* 8 Cal.3d 922, 925.)

(3d) Were we to vitiate the exemption[4] provided by section 225, "property manufactured or produced . . . outside of the United States and brought into this state for trans-shipment out of this state," during the tax years in question would be subject to ad valorem taxation. However, "a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential." (*Japan Line, Ltd. v. County of Los Angeles* (1979) *supra,* 441 U.S. 434, 446-448 [60 L.Ed.2d 336, 347].) Were such taxation permissible, one could well expect a proliferation of similar taxation structures in each seaboard state. As a result, that uniformity of policy which is essential to foreign commerce would be disturbed by multiple taxation. In the interests of the uniformity in commercial relations with foreign nations required by both the import-export clause and the commerce clause, seaboard states must either be prohib-

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[4]The opinion expressed herein addresses only the propriety of the exemption provided by section 225; we do not address the propriety of the ad valorem tax itself.

ited from taxing imports and exports on the basis of their place of origin or destination (*Michelin Tire Corp. v. Wages, supra,* 423 U.S. 276, 285-286 [46 L.Ed.2d 495, 503]) or be required to provide an exemption from taxes which would threaten that uniformity. The propriety of providing an exemption from state taxation for goods arriving from or destined for a port outside the United States is, therefore, consistent with both the import-export clause and the commerce clause unless a finer basis for invalidation exists.

(152 Cal.App.3d 265]

(6) In order to determine whether section 225 conflicts with the commerce clause, we must consider whether section 225 applies "to an activity with a susbstantial nexus with [California], is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." (*Complete Auto Transit, Inc. v. Brady* (1977) 430 U.S. 274, 279 [51 L.Ed. 2d 326, 331, 97 S.Ct. 1076].) In addition, because section 225 entails commerce with foreign nations, we must assess the risk of international multiple taxation and the extent to which the Federal Government is precluded from "speaking with one voice." (*Japan Line, Ltd., supra,* 441 U.S. 434, 451 [60 L.Ed.2d 336, 349].)

(3c) There can be no doubt, the exemption provided by section 225 is tied "to an activity with a substantial nexus with" California. Absent the exemption, California ports stand to lose a large share of import and warehousing business to other Pacific Northwest or inland ports of entry where the cost of labor, warehousing and taxation may be lower. For the same reasons, the exemption is clearly "related to [those] services provided by the State" which pertain to the efficient operation of local

ports of entry, services which support the state's legitimate interest of encouraging commerce by levying taxes and creating exemptions thereto. (*See Boston Stock Exchange v. State Tax Comm'n* (1977) 429 U.S. 318 [50 L.Ed.2d 514, 97 S.Ct. 599].) (7) Such interests may justify taxation measures and exemptions thereto, for "a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary. . . ." (*Allied Stores of Ohio v. Bowers* (1959) 358 U.S. 522, 528 [3 L.Ed.2d 480, 485, 79 S.Ct. 437].)

(3d) Moreover, the validity of section 225 does not entail an issue of questionable apportionment, i.e., an inquiry into whether the effect of a tax is reasonably and fairly related to the presence of a commercial activity within the state. (*Memphis Gas Co. v. Stone* (1948) 335 U.S. 80 (92 L.Ed. 1832, S.Ct. 1475].) As we are not assessing whether the extent of a commercial burden is reasonably related to the presence of a business interest in California, we need inquire no further into apportionment of a burden.

In addition, we find no evidence that section 225 discriminates against interstate commerce. (8) It is well established that the commerce clause does not preclude all state regulation; areas of commercial regulation not preempted by the federal government may be amenable to regulation by the state. (*Cooley v. Board of Wardens* (1852) 53 U.S. (12 How.) 299, 319 [13 L.Ed. 996, 1004].)

(5b) In order to determine whether a tax is discriminatory, it is necessary to examine the entire tax structure of the state. (*Washington v. United*

[152 Cal.App.3d 266]

States (1983) — U.S. ____[75 L.Ed.2d 264, 103 S.Ct. 1344]; *Phillips Co. v. Dumas School Dist.* (1960) 361 U.S. 376, 383 [4 L.Ed.2d 384, 389, 80 S.Ct. 474].) In the absence of congressional action, only the "clearest constitutional mandate justifies the denial of a state's taxing power. (*Washington v. United States, supra,* ____ U.S. ____, quoting from *Michelin Tire Corp. v. Wages, supra,* 423 U.S. 276, 293 [46 L.Ed.2d 495, 507-508].) Whether a tax is impermissibly discriminatory depends upon the economic burden which results therefrom. (*Washington v. United States, supra,* ____ U.S. ____.)

(3e) The practical effect of the contested section is to encourage the use of California's ports by California and non-California based manufacturers and producers who import foreign goods through California ports for trans-shipment to other states or who export goods manufactured or produced in other states through California to ports outside the United States. It is essential to note that the ineligibility applies equally to California and non-California business entities. Thus, the only producer or manufacturer who is ineligible for the exemption is a producer or manufacturer using California ports for shipment of goods produced or manufactured in California to foreign countries or for receipt of goods from foreign countries for use in California operations. The California business, however, which imports goods from foreign countries for trans-shipment to other states or who exports goods manufactured in other states through California ports is entitled to the exemption just as is an out-of-state business engaged in the same trade.

Thus, section 225 clearly does not "prohibit the flow in interstate goods, place added costs upon them, or distin-

guish between in-state and out-of-state companies in the retail market." (*Exxon Corp. v. Governor of Maryland* (1978) 437 U.S. 117, 126 (57 L.Ed.2d 91, 100, 98 S.Ct. 2207].) In the absence of any of these factors, we find section 225 provides no advantage to local business; thus, we do not find the discriminatory effect which would constitute a violation of the commerce clause. (*Ibid.*; *Maryland v. Louisiana* (1981) 451 U.S. 725 [68 L.Ed.2d 576, 101 S.Ct. 2114].) This is not an instance where "the effect of a state regulation is to cause local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market. . . ." (*Exxon Corp. v. Governor of Maryland, supra,* 437 U.S. 117, 126, fn. 16 [57 L.Ed.2d 91, 100].)

As section 225 provides an exemption from tax rather than the imposition of such a burden, the risk of international multiple taxation is nonexistent. Moreover, as noted *ante,* the exemption does not interfere with the federal government's "one voice" regulating our nation's foreign affairs. (*Japan*

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Line, Ltd, supra, 441 U.S. 434, 451 [60 L.Ed.2d 336, 349].) Federal uniformity is not impaired.

In view of the above, we hold section 225 is both consistent with the federal import-export clause and nonviolative of the federal commerce clause. Plaintiff is entitled to the relief sought.

The judgment is reversed.

Lillie, J., and Hubbell, J.,* concurred.

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*Assigned by the Chairperson of the Judicial Council.

APPENDIX D

STAR-KIST FOODS, INC.

CORPORATE ORGANIZATION

June 30, 1986
(Revised July 15, 1986)

H. J. Heinz Company
(Pennsylvania)

Star-Kist Foods, Inc.
(California — 100%)

Star-Kist Caribe, Inc.
(Delaware — 100% — Sec. 936)
Canning tuna; investments; holding company

Alpha Fishing Company, Inc.
(Puerto Rico — 51%)
Tuna fishing company M/V "Mary S" adjudicated to bank; subsequently sold May, 1985

Gamma Fishing Company, Inc.
(Puerto Rico — 50%)
Tuna fishing company M/V "Venturous", declared bankruptcy April, 1985

Livno Fishing Company, Inc.
(Cayman Islands — 100%)
Tuna fishing company owns 20%
M/V "Adriatic Sea" (See Zadar below)

Mayaguez Water Treatment Co., Inc.
(Puerto Rico — 50%)
Receiving, treating and discharging waste water

Productos Alimenticios Del Mar,
S. A. (Mexico — 15%) PALMAR
Tuna fishing company, M/V "Azteca I", M/V "Azteca II", M/V "Azteca III"

Star-Kist Reunion, Inc.
(Delaware — 100%)
Fish buying station and cold storage operation in Indian Ocean

Zadar Fishing Company Ltd.
(Cayman Islands — 22.81%)
Tuna fishing company. Owns 80% M/V "Adriatic Sea" (See Livno above)

Zagreb Fishing Company Ltd.
(Cayman Islands — 38.25%)
Tuna fishing company M/V "Don Juan Zee"

Star-Kist International, S. A.
(Panama — 100%)
Ghana freezer base; joint venture shipping

China Marine Overseas, S. A.
(Panama — 33⅓%) CMO
Liquidation/Dissolution in Process
Inactive company

Compania Pesquera Estrella del Peru, S. A.
(Peru — 2.10%) COPES
Cannery freezer plant; fishing vessels (see page 3 for percent owned directly by SKF)

Ghana Tuna Fishing Development Co. Ltd
(Ghana — 33⅓%)
Tuna fishing; vessels "Mary Radine", "Nick T", "Fernanda Marisa", "Big John", "Kawamina Nortey", "Nii Anumla"

International Tuna Sales Company, S. A.
(Panama — 100%) ITSACO
Fish broker (inactive)

Pioneer Food Cannery Limited
(Ghana — 50%)
Tuna cannery in Ghana

Pioneer Tuna Fishing Co. Ltd.
(Ghana — 50%)
Tuna fishing company, including sale and export of raw fish M/V's "Baeg du San" #6, #7, #8, #9

Refrigerated Express Service Ltd.
(Bahamas — 51%)
Formerly owned refrigerated reefer vessels "Fortuna Reefer" and "Reefer Carrier". Now enters into time charters.

Calafia Shipping Company Ltd.
(Bahamas — 50%)
Owns stock interests in United Reefers Inc. and two Dutch reefer vessel owning companies.

United Reefers, Inc.
(Netherlands Antilles — 12½%)
Charters Dutch reefers vessels.

Zeerederij Holland Brabant B.V.
(Netherlands — 50%)
M/V "Maya"

Zeerederij Holland Zeeland B.V.
(Netherlands — 50%)
M/V "Calafia"

Tri-Arrow Transportation Company, Ltd.
(Bahamas — 16.7%)
Inactive; formerly owned refrigerated reefer vessel "Fortuna Carrier" Sold for scrap.

Star-Kist Asia, Ltd.
(Delaware — 100%)
Trading in raw sea food products out of Tokyo office

Star-Kist Overseas, Inc.
(Delaware — 100%)
Foreign branch operations of Star-Kist Foods, Inc., primarily in Peru and New Zealand

Estremar del Peru, S.A.
(Peru — 100%)
Sale and distribution of fish products. Enter into trademark licensing agreements

Star-Kist Overseas:
Peru Branch
Joint operation with Government of Peru

Star-Kist Samoa, Inc.
(California — 100% — Sec. 936)
Tuna Cannery; can manufacturer

Fishermans Club of Samoa, Inc.
(Delaware — 50%)
Recreational facility for Oriental fishermen in Samoa

Marine Containerships Limited
(Liberia — 50%)
Joint shipping venture; owns 51% of M/V "Polynesia"

Ace Fisheries Company Inc.
(Puerto Rico — 100%)
Cash assets from sale of M/V "Royal Pacific" and M/V "Michelangelo"

Albacora Sociedad Anonima
(Costa Rica — 100%)
Inactive company

Aleta Amarilla Sociedad Anonima
(Costa Rica — 100%)
Inactive company

Anthony-Christina, Inc.
(Delaware — 100%)
Tuna fishing company. Formerly held 20% limited partnership interests in M/V "Christina C" and M/V "Conqueror", both of which have been sold at foreclosure

Brighton Fishing Company, Inc.
(Delaware — 100%)
Holds 20% general partnership interest in M/V "Capt. M. J. Souza" and 49% stock interest in La Estrella Atunera del Orinoco, S. A. (LEDOSA)

La Estrella del Orinoco, S.A. (LEDOSA)
(Venezuela — 49%)
Charters vessels to fish under Venezula laws (M/V "Caroni" ex. Capt. Frank Medina, M/V "Apure", ex Carolyn M., M/V "Manzanares", ex. Seawolf.)

Canner's Steam Company Incorporated
(California — 20% voting stock; 33.5% non-voting)
Provides steam for cannery operations at T. I.

C & F Fishing Ltd.
(California — 25%)
Tuna fishing company M/V "Jeanette Diana"

Compania Pesquera Estrella del Peru, S.A.
(Peru — 46.90%) COPES
Cannery freezer plant; fishing vessels (see page 1 for additional percentage owned directly by SKI)

Compagnie Bretonne de Cargos Frigorifiques
(France — 21.5%) COBRECAF
Diversified tuna fishing and refrigerated freight company

Connie Jean, Inc.
(Washington — 100%)
Tuna fishing company. M/V "Connie Jean" sold in 1984

Delta Fishing Company, Inc.
(Puerto Rico — 38.25%)
Tuna fishing company. M/V "Priscilla M"

Don Juan Fishing Company, Inc.
Puerto Rico (Puerto Rico — 38.25%)
Tuna fishing company. Formerly owned M/V "Don Juan" (see page 1 — Zagreb)

Eastern Pacific Fishing Company, Inc.
(Delaware — 100%)
Tuna fishing company. M/V "Eastern Pacific" sold in 1985 Under installment sale

Eastern Pacific Ltd.
(Cayman Islands — 100%)
Tuna fishing company. Formerly owned M/V "Eastern Pacific" (see above)

Entrepots et Transports
Figorifiques Polynesiens
(Tahiti — .8%)
Liquidation/Dissolution in Process. Cold storage plant in Tahiti

Epsilon Fishing Company, Inc.
(Puerto Rico — 38.25%)
Tuna fishing company. M/V "Danica"

Eta Fishing Company, Inc.
(Puerto Rico — 38.25%)
Tuna fishing company. M/V "Kali"

Claudia B Fishing Company, Inc.
(Delaware — 50%)
Tuna fishing company M/V "Claudia B"

Fast Overseas Services, Inc.
(Delaware — 100%)
Domestic purchasing agent; overseas packer/exporter; agent — Canadian pet food sales

Frances Ann-Liberator, Inc.
(Delaware — 100%)
Tuna fishing company. Holds 19% limited partnership in Sea Wolf Partnership, Ltd.

Frontier Fishing Corporation
(California — 20%)
Tuna fishing company. M/V "Neveri" (ex-M/V "Frontier")

Holdinmex, S. A. de C. V.
(Mexico — % equal to 4 shs. stock)
Holding company in Mexico for H. J. Heinz Company

Interamericana de Alimentos Ltda.
(Brazil — 100%) INTERAL
Industrialize, market, import and export food products in Brazil

Interocean Equipment Corporation
(California — 50%)
Owns and leases dry cargo and refrigerated shipping containers to M/V "Polynesia" (See: SKI-Marine Containerships Limited)

Koram Fisheries, S. A.
(Panama — 30%)
Owns and operates fishing vessels in the Pacific and Atlantic Oceans

L. A. Fishing Company, Inc.
(Nevada — 100%)
Tuna fishing company. Owns 51% general partnership interest in M/V "Laura Ann"

Las Perlas Fishing Corporation
(Panama — 20%)
Inactive tuna fishing company

Liberty King, Inc.
(Delaware — 50%)
Tuna fishing company. M/V "Cheryl Marie"

Liberty Prince, Inc.
(Delaware — 100%)
Owns 20% shareholder interests in
Nicole K Ltd. and Pacifico Fishing Ltd.

Mary Lyn Fishing Company, Inc.
(Puerto Rico — 100%)
Inactive tuna fishing company.
M/V "Mary Lyn" sold at auction.

Nicole K Fishing, Inc.
(Puerto Rico — 20%)
Inactive fishing company. Formerly
owned M/V "Nicole K" sold at auction

Manko Star International Trading
Company, S. A. (Panama — 50%)
Inactive company

Marine Trading Pacific, Inc.
(Delaware — 100%)
Fishing activities and vessel support in the Orient

Marven, Inc.
(Puerto Rico — 100%)
Fuel Supplier. (SKF v.Viguie —
court adjudicated 100% stock and assets
to SKF)

May Queen, Inc.
(Delaware — 100%)
Tuna fishing company. Owns 17.5/25ths
undivided interest in M/V "Sea Hawk";
20% limited partnership interest in M/V
"Captain Frank Medina"; 19% in
M/V "Carolyn M"

Mermaid-Southern, Inc.
(Delaware — 100%)
Tuna fishing company. Owns 20% limited partnership interest in M/V "Conquistador" which is now under Chapter 11 proceedings.

Michelangelo Fishing Company, Inc.
(Delaware — 100%)
Tuna fishing company. Holds 20% interest in M/V "Tifaimoana" which is tied-up in foreclosure proceedings

Montana Fishing Corporation
(California — 100%)
Tuna fishing company.
M/V "Arauca" (ex-M/V "Montana")

New Era, Inc.
(Delaware — 100%)
Tuna fishing company. Owns 40% limited partnership interest in M/V "Pacific Princess"

Pacific Forwarding Enterprises S.A.
(Panama — 100%) PACFORE
Joint shipping venture; freight wharfage.

Pacific King, Inc.
(Delaware — 50%)
Tuna fishing company.
M/V "Mary Antoinette"

Pacific Prince, Inc.
(Delaware — 100%)
Tuna fishing company. Formerly owned M/V "Guanipa" (ex-M/V "Kerri M")

Pantry Pride, Inc.
(Delaware — % equal to 2452 Shs. Stock)
Supermarket chain; stock received in Chapter 11 proceedings. Stock being sold.

Pisces Fishing Company, Inc.
(Delaware — 51%)
Tuna fishing company. M/V "Pisces"

Proyectos Empresariales Submarinos
Centro America Sociedad Anonima
(Costa Rica — 100%)
Inactive company

Raffaello Fishing Company, Inc.
(Delaware — 50%)
Tuna fishing company. M/V "Raffaello"

Royal Fishing Company, Inc.
(Puerto Rico — 100%)
Inactive fishing company. Formerly chartered vessles form Ocean Fisheries, Inc.

R. P. Fishing Company, Inc.
(Puerto Rico — 100%)
Tuna fishing company. M/V "Royal Pacific"

Scorpio I Fishing Company, Inc.
(Delaware — 51%)
Tuna fishing company.
M/V "Scorpio I" sold 1983

S-K Fishing Company, Inc.
(Delaware — 100%)
Inactive Company.
Intended as Venezuela investment vehicle

Societe Togolese de Thon
(Toga — 100%)
Inactive company.

Star-Kist Canada, Inc.
(Canada — 100%)
Acquired Ocean Maid Foods Limited;
Canadian tuna processor and marketer.

Star-Kist Europe, Inc.
(Delaware — 100%)
Buys, sells, distributes and markets food products in Europe

Star-Kist Fiji Limited
(Fiji — 100%)
Inactive company

Tahiti Tuna Ventures, S. A.
(Panama — 50%)
Inactive company. Joint fishing venture with Bumble Bee Seafoods. To be liquidated/dissolved

Societe Tahitienne de Peche
(Tahiti — 49%) SOTAP
Inactive company

The French Sardine Company of California
(California — 100%)
Inactive company formed to perpetuate ownership of name

Venatun, S. A.
(Venazuela — 10%)
Tuna Fishing Company. M/V "El Rifle", M/V "Jane", M/V "Napoleon", M/V "Lucille", "La Foca"

Yugo American, Inc.
(California — less than 5%)
Social club in San Pedro

Zeta Fishing Company, Inc.
(Puerto Rico — 38.25%)
Tuna fishing company M/V "Eliza M". Various Percentages in Domestic Partnership Vessels

Anchor Fishing Company, Ltd.
23.75 limited partnership interest
Star-Kist Foods, Inc. M/V "Stacie Antonette"

Carolyn M Partnership, Ltd.
19% limited partnership interest
May Queen, Inc., M/V "Carolyn M"

Conquistador Partnership, Ltd.
20% limited partnership interest
Mermaid-Southern, Inc., M/V "Conquistador"

Deborah Ann Partnership, Ltd.
20% limited partnership interest
May Queen, Inc., M/V "Captain Frank Medina"

Laura Ann Partnership
51% general partnership interest
L. A. Fishing Company, Inc., M/V "Laura Ann"

Pacific Princess Partnership Ltd.
40% limited partnership interest
New Era, Inc., M/V "Pacific Princess"

Sea Wolf Partnership, Ltd.
19% limited partnership interest
Frances Ann-Liberator, Inc.
M/V "Mansanares" (ex-"Sea-Wolf")

Captain Manuel J. Souza Partnership
20% general partnership interest
Brighton Fishing Company, Inc.
M/V "Manuel J. Souza"

Tifaimoana Partnership, Ltd.
20% limited partnership interest
Michelangelo Fishing Co., Inc.
M/V "Tifaimoana"

Companies Owned by H. J. Heinz Company
Operated and Accounted for by Star-Kist Foods, Inc.

Caribbean Fishing Co., Inc.
(Delaware — 100%)
AFICA vessel finance company

Establissements Paul Paulet, S. A.
(France — 80%)
Tuna fishing, processing, and marketing company in France

COMPANIES AND PARTNERSHIPS LIQUIDATED/ DISSOLVED/MERGED/OWNERSHIPS SOLD IN 1985-1986

Albacore Navigation, S.A.	1984
Albafrigo Navigation Co., S.A.	1984
Compania Naviera Aztec, S.A.	1985
Liberator Fishing Company Partnership	03/86
Nicole K, Ltd.	05/27/85
Mancha Fishing Limited	09/30/85
Pacifico Fishing, Ltd.	09/30/85
Red Star Fisheries Limited	09/30/85
Societe des Frigorifiques du Senegal (SOFRIGAL)	09/03/85

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On November 24, 1986, I served the within Petition for Writ of Certiorari in re: "Star-Kist Foods, Inc. -v- County of Los Angeles" in the United States Supreme Court, October Term 1986, No. .....;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

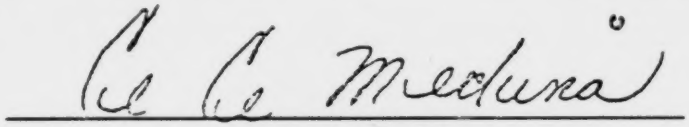
ATTORNEY GENERAL STATE OF CALIFORNIA
JOHN K. VAN DE KAMP
1515 "K" Street Suite 511
Sacramento, California 95814

DE WITT CLINTON, Esq.
County Counsel
EDWARD G. POZORSKI Esq.
Principal Deputy County Counsel
PHILIP HICKOK Esq.
Principal Deputy County Counsel
C/O Philip Hickok Principal Deputy County Counsel
500 W. Temple Street Suite 648
Los Angeles, California 90012

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 24, 1986, at Los Angeles, California



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Supreme Court, U.S.
FILED
FEB 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-876 (3)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

STAR-KIST FOODS, INC.,
a California corporation,

Petitioner,

vs.

COUNTY OF LOS ANGELES,
CITY OF LOS ANGELES AND
CITY OF LONG BEACH,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DE WITT W. CLINTON
County Counsel
PHILIP H. HICKOK
Principal Deputy
County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 974-1821

Attorneys for Respondents
COUNTY OF LOS ANGELES, CITY OF
LOS ANGELES AND CITY OF
LONG BEACH

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Attorneys for Respondents
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I.

ARGUMENT

The petition is moot. Petitioner has requested this Court to exercise its discretionary jurisdiction in this case by issuing a writ of certiorari to the California Supreme Court. In support of this request,

Petitioner cites the importance of the case from both a Federal procedural and Commerce Clause standpoint.

Respondents contend that subsequent statutory changes have rendered these issues moot with regard to all persons in California, save Petitioner.

A. The Case No Longer Presents A Substantial Federal Procedural Issue On The Standing Of Counties To Sue The State.

Petitioner assigns as error the California Supreme Court's holding that a county of the State has standing to challenge the validity of a state statute as being repugnant to the United States Constitution (Starkist Foods, Inc. v. County of Los Angeles (1986) 42 Cal. 3d 1, 10).

No longer is this an issue in California. In 1976, the Los Angeles County Assessor refused to follow the provisions of a business

inventory tax statute (Revenue and Taxation Code Section 225). As a result of this action, the California Legislature enacted Section 538 of the Revenue and Taxation Code in 1978. (The chaptered law is set forth in Appendix A hereto). This section provides that if an Assessor believes a tax statute is unconstitutional, in lieu of making an assessment, he shall file a declaratory relief action against the State setting forth his concerns.

The section was enacted as urgency legislation which went into "effect immediately to eliminate the further potential harm from such action by assessors, especially with respect to Sections 225 and 253.10 of the Revenue and Taxation Code." (1978 Stats, Ch. 1188, Sec. 4, p. 3840).

In light of this section, no future case raising commerce clause concerns can reach this Court in the same posture as this one.

B. The Case No Longer Presents A Substantial Federal Issue Involving The Commerce Clause.

This case involves the constitutionality of Section 225 of the California Revenue and Taxation Code as it was applied to Petitioner in 1976. That section exempted from a business inventory tax imported personal property which was destined for an interior state. No similar exemption was provided domestic goods shipped to an interior state.

Again in direct response to the situtation presented by the actions of the Los Angeles County Assessor, the Legislature enacted urgency legislation. In 1980, all such personal property, foreign and domestic, was exempted from taxation. (1980 Stats, Ch. 411 Sec. 8, p. 801, attached hereto as Appendix B) The effect of such legislation was to eliminate the disparate treatment of domestic and foreign goods. Hence, no longer was there

a violation of the Commerce Clause.

In 1984, the Legislature repealed Section 225 to formally close the chapter on California's taxation of business inventory. (1984 Stats, Ch. 678, Sec. 10, p. 1, attached hereto as Appendix C).

Petitioner is the only taxpayer in the State of California that has a stake in the outcome of this case. All other litigation which had been filed regarding Section 225 has been finally resolved.

II.

CONCLUSION

In order for certiorari to be granted, this Court has uniformerly required the issues presented be of great importance under the Constitution. Only cases presenting questions whose resolution will have immediate importance far beyond the particular facts and parties involved will be selected for a grant

of certiorari (From Address of Chief Justice Vinson before the American Bar Association, September 7, 1949, 69 S.Ct. v., vi).

These words continue to ring true today. A problem must be beyond the academic or the episodic and be of importance to the public as distinguished from important to the parties in order to warrant review by this Court (Rice v. Sioux City Cemetary 349 U.S. 70, 74 (1955)).

While an issue may be ripe for decision by state courts, it may spoil if the statute which is the basis for the action is repealed (U.S. Department of Justice v. Provenzano 469 U.S. ___, 105 S.Ct. 413, (1984). In civil cases, speculative contingencies which might conceivably affect substantial rights of the interested parties afford no basis for the Court passing on the substantive issues in the absence of evidence that there is a prospect of immediacy and reality. (Tiverton

Board of License Commissioners v. Pastore 469 U.S. 238 (1985)).

Counsel for Respondents is under a duty to apprise the Court of changed circumstances which might influence the Court in its decision to grant or deny certiorari; especially when such changes are the repeal of the very statute in question in this case (Fusari v. Steinberg 419 U.S. 379 (1975)).

Respondents respectfully submit that whatever substantial Federal Constitutional issues were once presented by this case, they have been eliminated by the repeal of Section 225 and enactment of Section 538 and warrant a denial of certiorari by this Court.

DATED: 2/19/87

Respectfully submitted,

DE WITT W. CLINTON
County Counsel
By: PHILIP H. HICKOK
Principal Deputy
County Counsel

Attorneys for Respondents

APPENDIX A

CHAPTER 1188

An act to amend Section 5141 of, and to add Sections 538 and 5152 to, the Revenue and Taxation Code, relating to taxation, and declaring the urgency thereof, to take effect immediately. [Approved by Governor September 26, 1978. Filed with Secretary of State September 26, 1978]

The people of the State of California do enact as follows:

SECTION 1. Section 538 is added to the Revenue and Taxation Code, to read:

538.

(a) If the assessor believes that a specific provision of the Constitution of the State of California, or this division, or of a rule or regulation of the board is unconstitutional or invalid, and as a result thereof concludes that property should be assessed in a manner contrary to such provision, or the assessor proposes to adopt general interpretation of a specific

provision of the Constitution of the State of California, or this division, or of a rule or regulation of the board, that would result in a denial to five or more assessees in that county of an exemption, in whole or in part, of their property from property taxation, the assessor shall, in lieu of making such an assessment, bring an action for declaratory relief against the board under Section 1060 of the Code of Civil Procedure. The court shall allow intervention in such action by potential assessees and other assessors under Section 387 of the Code of Civil Porcedure to the greatest extent practacable.

(b) If the assessor obtains judgment in such action upholding the validity of such assessment, the assessor shall correct the roll in accordance with Section 4831 consistent with such judgment within 60 days of the date upon which the judgment becomes

final, regardless of the time limit otherwise provided in Section 4831. The assessor shall not levy an assessment based upon the subject matter of the action under any other section of this division.

(c) Within 60 days of notice of such assessment, a person assessed under subdivision (b) may file a claim for refund relating to the assessment of any of the person's property for the fiscal year to which the assessment under subdivision (b) relates regardless of the time limit otherwise provided in Section 5097.

. . .

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The Legislature has adopted urgency legislation in the past to prevent severe hardship that would be caused to various sectors of the state by the operation of the property tax laws. Certain assessors have chosen not to follow such legislation, resulting in assessments causing the very hardship sought by the Legislature to be avoided. This act must go into effect immediately to eliminate the further potential harm from such action by assessors, especially with respect to Sections 225 and 253.10 of the Revenue and Taxation Code.

APPENDIX B

CHAPTER 411

An act to amend Section 65863.5 of, and to amend and renumber Section 65863.5 of the Government Code, to amend Sections 107, 155, 279.5, 408.1, 506, 533, 2188.6, 2189.6, 2190, 2191.3, 2635, 2922, 3513, 3692, 3698.5, 3707, 3708, 3710, 3772.5, 3804, 4217, 4377.1, 4675, 4831, 4835, 4836, 5150, and 5151 of, to amend and renumber Section 135 of, to add Sections 155.3, 219, 275.5,455, 568, 3706.1, and 4672.2 to, to repeal Sections 219, 225, 253.10, 402.2, 568, 2822, 3696, 3696.5, 3697, 3715, and 4152 of, and to repeal Part 11 (commencing with Section 5501) of Division 1 of, the Revenue and Taxation Code, and to amend Section 19.80 of Chapter 1150 of the Statutes of 1979, relating to taxation, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor July 11, 1980. Filed with Secretary of State July 11, 1980.]

The people of the State of California do enact as follows:

. . .

SEC. 8. Section 219 is added to the Revenue and Taxation Code to read:

219. For the 1980-81 fiscal year and fiscal years thereafter, business inventories are exempt from taxation and the assessor shall not assess business inventories.

. . .

SEC. 52. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

Certain provisions of this measure, including the repeal of the livestock head-day tax, must be in effect during the 1980-81 fiscal year in order to avoid useless filings of reports, and to correct certain problems

relating to collection of taxes which create confusion for taxpayers and jeopardize collection of revenues in an orderly manner.

APPENDIX C

CHAPTER 678

(Assembly Bill No. 2433)

An act to amend Sections 11126, 15606, 51111, and 51112 of the Government Code, and to amend Sections 64, 261, 408, 408.2, 409, 423, 423.5, 426, 437, 439.2, 439.3, 469, 480.1, 480.2, 482, 670, 1638, 1640.1, 2132, 2256.2, 5832, 38204, and 38905.1 of, to add Section 11342 to, and to repeal Sections 155.2, 155.3, 155.21, 225, 225.2, 225.3, 226, 233, 253.10, 619.1, 981, 992, 993, 2054, 38902, and 38903.1 of, the Revenue and Taxation Code, relating to taxation.

[Approved by Governor August 20, 1984, Filed with Secretary of State August 22, 1984.]

. . .

The people of the State of California do enact as follows:

. . .

SEC 10. Section 225 of the Revenue and Taxation Code is repealed.

SEC. 11. Section 225.2 of the Revenue and Taxation Code is repealed.

SEC. 12. Section 225.3 of the Revenue and Taxation Code is repealed.

SEC. 13. Section 226 of the Revenue and Taxation Code is repealed.

SEC. 14. Section 233 of the Revenue and Taxation Code is repealed.

SEC. 15. Section 253.10 of the Revenue and Taxation Code is repealed.

Supreme Court, U.S.
FILED
FEB 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-876

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1986

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Petitioner,

vs.

COUNTY OF LOS ANGELES, CITY OF LOS ANGELES
AND CITY OF LONG BEACH,
Respondents.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

CHARLES R. AJALAT, ESQ.
643 SOUTH OLIVE STREET, SUITE 200
LOS ANGELES, CALIFORNIA 90014
(213) 622-7400
Attorney for Petitioner.

TERRY L. POLLEY, ESQ.
RICHARD J. AYOOB, ESQ., AND
AJALAT & POLLEY, A Partnership
Including Professional Corporations
Of Counsel.

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I.

ARGUMENT

Considering the dramatic importance of the standing issue and the Commerce Clause issues involved in this case--both to California and to the United

States as a whole, as well as the 11-year controversy between Petitioner and Respondents over this issue--it is incredulous as well as erroneous for Respondents to argue the petition is moot.

The issues were of such importance, and so non-impacted by subsequent statutory changes that the California Supreme Court exercised its discretionary jurisdiction to review the matters.

A. The Case Presents a Substantial Federal Procedural Issue on the Standing of Counties to Attack State Statutes

Respondents argue that Section 538 of the Revenue and Taxation Code makes the procedural issue unimportant for the future. The California Supreme Court disagreed with Respondents by exercising its discretionary jurisdiction and even used Section 538 to help support its

rationale regarding the federal rule of standing.

Even if Section 538 took care of County attacks on tax statutes,[1] such

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[1] Even in the tax area, the County has ignored Section 538. Petitioner has a case similar to the one involved herein (which is for the 1976 tax year) for 1977, 1978 and 1979 pending in the Los Angeles Superior Court. The latter case involves a tax year after the enactment of Section 538. Rather than use the statutory procedure of Section 538 for the 1979 year, the County continued to ignore the state statutory exemption in effect for that year, and to refuse to refund entirely the money involved, even after the Court of Appeal in California ruled the statute constitutional.

section does not address the ability of local governments to attack state statutes generally.

The California Supreme Court has misinterpreted the federal rule--finding a conflict between the Fifth and Ninth Circuit Courts of Appeal--and the State High Court created a new rule of federal standing based on federal district court decisions. This area of the law has awaited clarification from the United States Supreme Court for over 25 years and is clearly a substantial question.

B. The Case Presents a Substantial Federal Issue Involving the Commerce Clause

Because the California Legislature chose, four years after the tax year in question, to exempt all inventory from property taxation, Respondents argue that the critically important Commerce Clause issue, and the issue of what tax incentives the States may give in

structuring their tax systems has disappeared.

Again, the California Supreme Court disagreed with Respondents and, recognizing the later total inventory exemption, dealt with the Commerce Clause questions which were extremely important to California as well as the nation. Respondents cite no authority for, and are simply wrong, in arguing that the total inventory exemption was enacted as a result of the Section 225 problem involved herein.

In arguing the unimportance of the issue at hand, Respondents ignore, as the California Supreme Court did not, that "Over 35 states have adopted similar 'free port' laws, many of which extend tax-exempt status to stored imports (Star-Kist Foods v. County of Los Angeles 42 Cal. 3d 1, at 11.)

Respondents ignore the fact that there are other pending cases in the Superior Court in California involving these exact issues.

Respondents further ignore the fact that the highest court of California has determined a substantial federal question of importance to all state tax incentives and done so based on federal law and in a manner contrary to the position of the federal government as reflected in the Solicitor General's brief.

They ignore the direct and immediate impact on the unitary tax problem that California has resolved after years of controversy and at the prodding of the federal government. And they ignore the fact that if the Star-Kist decision stands, it will add uncertainty for years as to the legislative solution because under the California Supreme Court decision the

legislative scheme resolving the unitary tax controversy is unconstitutional. It is so only because the California court wrongly decided the federal constitutional issue.

To leave the Star-Kist decision in place not only places the unitary tax legislative solution in doubt, but renews the foreign relations controversy which this problem causes the United States.

It further affects the ability of states to have tax incentives which are valid under this Court's precedents. As Chief-Justice Elect Lucas wrote in dissent:

"I write separately because today's decision improperly precludes the Legislature from future use of this valid device to attract foreign commerce to California ports." (Id. at 16.)

II.

CONCLUSION

The case at bar is not a case where the issue between the parties is moot or where there is no case or controversy. Tiverton Board of License Commissioners v. Pastore 469 U. S. 238 (1985)). It is not a case where a federal court has made a decision based on state law due process defects involving a lack of a remedy that have been deliberately corrected by a state legislature and where the issue involved looking at the law at the time of review so that a remand to the court below would be appropriate. (Fusari v. Steinberg 419 U.S. 379 (1975))

The case at bar is not one where the decision of this Court would not

affect the rights of the parties. (U.S. Department of Justice v. Provenzano 469 U.S. 14 (1984))

The issues involved in this case are clearly not just academic (Rice v. Sioux City Cemetery, 349 U.S.70 (1955)) but issues of the highest significance for California, other States, and the federal government.

It is for this reason that this Court previously granted certiorari on these issues. It is for this reason that the California Supreme Court exercised its discretionary jurisdiction. It is for this reason that this Court should grant the petition

for certiorari and decide the extremely important issues involved.

DATED: 2/23/87

Respectfully submitted,

CHARLES R. AJALAT
Attorney for Petitioner